

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

77-1196

To be argued by
JOHN HOLLAND FOOTE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

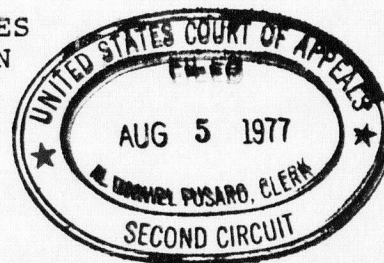
v.

CHARLES RUSSO,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

APPENDIX



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Western District of New York.

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Washington, D.C. 20530.

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1 or the defendant Russo was involved in
2 the operation and the defendant Comfort
3 was involved in the operation. The five
4 person requirement will be satisfied, I
5 believe, once you listen to his testimony.

6 Now, there is an additional element
7 and it is an element that Judge Curtin
8 did not discuss with you and that is,
9 that also, to constitute a violation of
10 the Federal Law, we must establish that
11 at least \$2,000 was wagered in any given
12 day of the operation of this gambling
13 business and in that regard, Special Agent
14 Brana will testify that he observed bets
15 being placed, that he would conservatively
16 estimate that approximately \$35,000 per
17 night in this game.

18 Now, as I have indicated to you, the
19 game continued for four days. There were
20 expenses, there were workers who had to
21 be paid and then on April 12, 1973 a
22 meeting occurred at the Webster Avenue
23 location. On that date, the defendant,
24 Russotti and the defendant Gingello met
25 with Mr. Zito in the back room at Webster

1 BY MR. PARRY:

2 Q Mr. Brana, what is your occupation?

3 A I am a Special Agent of the Federal Bureau of Investi-
4 gation.

5 Q How long have you been a Special Agent of the Federal
6 Bureau of Investigation?

7 A Twenty-two years.

8 Q Mr. Brana, directing your attention to March of 1973,
9 did you have occasion in that month to meet one Joseph
10 Zito?

11 A Yes, I did.

12 Q Would you tell us, please, who Mr. Zito is?

13 A Mr. Zito was to my knowledge, when I was introduced to
14 him, an individual from the Batavia area of New York
15 who was involved in criminal activities.

16 Q And at the time that you met Mr. Zito, was he introduced
17 to you as an informant or a potential informant for the
18 FBI?

19 A He was an individual that had been cooperating with
20 the Government.

21 Q And when you met Mr. Zito, were you introduced to him
22 as a Special Agent of the FBI?

23 A Yes, I was.

24 Q Now, at the time that you met with Mr. Zito, did you
25 you discuss with him an undercover operation that the

1 two of you were to undertake?

2 A Yes, I did.

3 Q And what was the, - could you give us the outline of
4 that undercover operation?

5 A I was advised that - -

6 MR. BOREANAZ: Your Honor, I will object to that

7 because I think we are past the introduc-
8 tion stage.

9 THE COURT: I will sustain the objection.

10
11 BY MR. PARRY:

12 Q Directing your attention, Mr. Brana, now, to March 31,
13 1973, did you have occasion on that date to meet with
14 one Charles Russo?

15 A Yes, I did.

16 Q And before we go any further, do you see Mr. Russo in
17 the courtroom here today?

18 A Yes, I do.

19 Q Would you point him out, please.

20 A He is the individual with the blue polka dot tie, blue
21 suit, pink shirt and moustache sitting to the left of
22 the gentleman with the gray hair.

23 Q Okay. For the record, the witness has identified the
24 defendant, Charles Russo. Now, Mr. Brana, would you tell
25 us where this meeting took place?

1 A Caledonia, New York, at the Steak Pit Restaurant.

2 Q Who was present at this meeting?

3 A Mr. Zito, Mr. Russo, Mr. Russo's wife and myself.

4 Q Now, at the time that you met with Mr. Russo, did you
5 introduce yourself as Special Agent Paul Brana?

6 A No, I did not.

7 Q What name did you use?

8 A I introduced myself as Paul Becera.

9 Q And what identity had you assumed for this meeting?

10 A I was an individual from New York who had connections
11 with a certain type of individuals involved primarily
12 in illegal type activity who could come up with a sum
13 of money.

14 Q And what was the significance of your being able to
15 come up with this sum of money?

16 A The reason for the money was because I had been asked
17 if I could finance a dice game or a crap game in
18 Rochester, New York.

19 Q And to your knowledge, was Mr. Russo involved in the
20 operation of this game?

MR. BOREANAZ: I object to that, your Honor.

THE COURT: Sustain the objection.

BY MR. PARRY:

Q You were asked, however, to fund a dice game or crap

game in Rochester, New York, is that correct?

A Yes, it is.

Q Now, did there come a time during the course of the evening when Mr. Russo's wife left the table that you were at?

A Yes, she did.

Q And would you tell us, please, what occurred when Mr. Russo's wife absented herself from the table at the Steak Pit Restaurant?

A Mr. Russo stated that he had a location in Rochester, New York and that the location where a crap game could be run. He stated he had workers for the crap game. He indicated that those workers would be Pauly who was his partner, Joe Zito, himself, Mr. Russo and a stick man. He indicated that he did not have the money he needed at the time for the game. He asked if I could come up with the money, \$5,000, and I told him that I thought that I could. He, at this time, indicated to me that the nut for running the game would be \$275 a day, that each of the workers was paid \$35; that the food man got \$10; that the rent was \$15, and that the police, when they came around would get, would be paid, \$10 a day. He told me that if I could come up with the money that I should bring it 300 in \$1 bills, a thousand in \$5 bills and the rest in tens. He told me that \$100

1 would be paid on a daily basis, or \$600 a week, because
2 the game did not operate seven days a week but rather
3 six days; that \$100 of the nut went to the Good Guys
4 or The Arm and he stated that the Good Guys had to be
5 paid the \$100 a day or else we just didn't run a crap
6 game in Rochester. In other words, this was permission
7 to run a crap game or a dice game in Rochester.

8 Q Now, was there any agreement as to how the profits from
9 this game would be split?

10 A Yes. Mr. Russo asked me if I would be satisfied with
11 a 70/30 split of the profits and I told him that I would
12 be since I had been willing or previously, I had been
13 willing, to take up to a 60/40 split of the profits.

14 Q Now, directing your attention to April 2nd of 1973, did
15 you have occasion again on that date to meet with Mr. Russo?

16 A Yes, I did.

17 Q And where did this meeting take place?

18 A At the airport at Rochester, New York.

19 Q And at that time, who was present at the meeting?

20 A Mr. Russo, Mr. Zito and myself.

21 Q And when you met with Mr. Russo, what, if anything, did
22 he tell you about potential backers for this game?

23 A Mr. Russo stated that the Good Guys had just returned
24 from Las Vegas where they had gone bust and he told me
25 that the location on Jay Street was no longer available

1 because - -

2 THE COURT: Mr. Brana, excuse me. You said the
3 Good Guys did what?

4 THE WITNESS: They had just returned from Las
5 Vegas where they had gone bus-.

6
7 BY MR. PARRY:

8 Q Could you elaborate on that?

9 A They had apparently lost whatever money they had taken
10 with them at the Las Vegas gambling operations.

11 Q Now, as to the backers for the game, however, what, if
12 anything, did Mr. Russo say to you on that occasion?

13 A Mr. Russo told me that Sammy G. was going to come up
14 with \$5,000 to back half of the game and that we would
15 split the profits 50/50.

16 Q Now, this individual, Sammy G., was he identified at
17 that time by any other name?

18 A He was subsequently identified as Sammy Gingello.

19 MR. BOREANAZ: I object to that as not responsive.

20 THE COURT: Strike that as not responsive and,
21 ladies and gentlemen, here I have sustained
22 objections to questions. That means that
23 under the rules I have determined that a
24 particular question should not be asked
25 and the answer should not be permitted.

In this case the answer has been given and I will strike the answer. That means you should not consider it at all during your deliberations as part of the evidence in this case. Next question, please, Mr. Parry.

BY MR. PARRY:

Q Mr. Brana, did Mr. Russo indicate to you where the location of this game would be?

A The new location would be on Webster Street, a location which had previously been used as a bookmaking operation.

Q And as a result of this move to a new location, had the daily nut, I believe is the term you have used, - was the daily nut adjusted in any manner?

A Yes, it was, in that the Good Guys were now willing to take \$200 a week rather than the previous \$600 a week.

Q And why was that? Was that explained to you?

A Well, because this was a smaller location. The location on Jay Street was - -

THE COURT:

Excuse me. Perhaps it is the way you ask the question but the way you ask the question, Mr. Parry, leaves the witness open for him to interpret certain events. He cannot be the interpreter of

what is going on. We are not here to have Mr. Brana's opinion. We are here to listen to what he heard, what he said and what the other person in the conversation said.

Was any explanation given to you by Mr. Russo of why there was a change in the amount of payment that had to be made to the Good Guys?

THE WITNESS: Yes, because Sammy G. who was one of the Good Guys was now part of the operation, they were with us and that's why the - -

THE COURT: Is this what Mr. Russo said to you?

THE WITNESS: Yes, sir.

THE COURT: Next question.

BY MR. PARRY:

Q Now, did Mr. Russo indicate to you that he would let you know when the Webster Avenue location would be ready to go?

A He stated that he was fixing it up, he would let Mr. Zito know and Mr. Zito should be in a position to tell me the next day, Wednesday.

Q Now, directing your attention to April 8, 1973, did you

have occasion on that date to meet with Mr. Russo?

A. Yes, I did.

Q Who was present at that meeting?

A Mr. Zito, Mr. Russo and myself.

Q Now, on that occasion, where did the meeting take place?

A I initially met with Mr. Russo at a bar and a bowling alley up the street from the 124 Webster location which was the site of the crap game.

Q Did you subsequently go with Mr. Russo and Mr. Zito to the Webster Avenue location?

A Yes, I did.

6 Could you describe that location for us, please?

A The location had two separate entrances. The one on the right was completely boarded off so that nobody could get into that area of the building. You walked in to the left. There was a soda machine and some chairs. You walked to the back, made a right turn through the kitchen and that led you into the, - where the crap table was located in the main gambling area. The main gambling room would be approximately, in size, 60 to 70 feet long by approximately 40 to 50 feet wide. It had an office in the front.

Q Now, in terms of the area where the gambling was to take place, was there any equipment there?

A Yes. There was a pool table which was utilized as a

1 crap table. It had special sides built on it so when
2 the dice were thrown down they wouldn't roll off the
3 table and these were removable sides.

4 Q Were there any markings on the pool table?

5 A Yes. They had a line for the bettor who wants to bet
6 with the shooter or against the shooter and also a
7 series of blocks with numbers in them in case the bettor
8 wanted to bet on individual points.

9 Q Now, when Mr. Russo showed you this crap table, did he
10 demonstrate any particular facet of the table to you?

11 A Yes. He explained to me that in case the police came
12 to either raid or look over the premises that they
13 could take up these two removable ends of the table and
14 that they would be hung on the wall and then the pool
15 balls would be put on the table. He also showed me
16 where the money box was kept, that the money box would
17 be taken off the table and put into the office.

18 Q Now, as you have described it, the numbers would remain
19 on the surface of the table?

20 A Yes, they would.

21 Q How were these numbers affixed to the table; was this
22 with chalk?

23 A They were inked in.

24 Q Now, did Mr. Russo make any statement to you at that
25 time concerning potential backers for the game?

1 A Yes. He stated that he had to see Sammy G. the following
2 day, Monday, to see if he was going to, you know, get
3 the \$5,000 from him.

4 Q Was there any further discussion concerning the nut that
5 had to be paid to the Good Guys?

6 A Yes. He stated that the nut was still \$200 a week.

7 Q Was there any discussion that you were privy to between
8 Mr. Russo and Mr. Zito concerning the police at this
9 time?

10 A Yes. We returned to the bar and Mr. Russo stated that
11 the ice was, - that Mr. Russo spoke to the owner of
12 the bar and he later on came over and he said that he
13 had made arrangements with the owner to have the Day
14 Captain come by to see Russo.

15 Q All right. Now, first of all, you used the term "ice".
16 What does that term mean?

17 A "Ice" would be protection from a raid.

18 Q From the police?

19 A Yes.

20 Q And you used the term "Day Captain". What do you mean
21 by "Day Captain"?

22 A I do not have any specific answer but to me that would
23 mean the captain in charge of the particular precinct
24 during the daylight hours.

25 Q Now, directing your attention to April 9, 1973, did you

1 have occasion on that date to be present at 124 Webster
2 Street?

3 A Yes, I did.

4 MR. BOREANAZ:

I am sorry, the date?

5
6 BY MR. PARRY:

7 Q April 9, '73. With whom did you arrive on that date?

8 A I arrived with Mr. Zito.

9 Q Approximately what time did you arrive?

10 A 8:15, 8:30.

11 Q Now, on that occasion, did you have any money with you?

12 A I had \$5,000.

13 Q And did you give that money to Mr. Russo?

14 A Yes, I gave it to Mr. Russo. We took it into the office,
15 counted it. Paul Comfort, Russo, Zito and myself counted
16 the money.

17 Q Now, where had you obtained this money?

18 A It was Government funds.

19 Q You had obtained it from the FBI, is that correct?

20 A Yes, sir.

21 Q Now, after Mr. Russo counted the money, what, if anything,
22 did he do with it?

23 A He put it in the box and the game began.

24 Q Now, this box that he put it in, could you describe it
25 for us, please?

1 A Well, it was approximately 15 inches wide and it was, -
2 had slots in between where they kept, - broke up the
3 bills, fives, tens, and singles.

4 Q And did this box, - during the game, did it stay on
5 the table?

6 A It remained on the crap table.

7 Q Now, after Mr. Russo had placed the money in the box,
8 did you have any conversation with Mr. Russo about
9 Sammy G.?

10 A Yes. I asked him if Sammy G. had come up with the
11 \$5,000 yet and he stated that he had not.

12 THE COURT: Excuse me, Mr. Parry. Can you hold
13 it just a minute.

14 MR. PARRY: Yes, sir.

15 THE COURT: All right, Mr. Parry. Thank you.

16
17 BY MR. PARRY:

18 Q Now, did the game begin thereafter?

19 A Yes, it did.

20 Q And were you present while the game was in operation?

21 A Yes, I was.

22 Q Approximately how long did the game run?

23 A The game lasted for approximately an hour, hour and
24 a half.

25 Q Now, in terms of the game itself, can you describe for

11

us, please, how the game was played?

A All bets were against the house. It is a modified Las Vegas type game but all bets are against the house as opposed to a rough and tumble game where each, - where the players can bet against each other.

Q Now, when you say that all bets were against the house, can you explain that a little bit further? That is, the house had a bank roll at this point?

A The house had a \$5,000 bank roll. Any individual that was at the game could bet against the shooter or with the shooter, all bets being faded by the house. Additionally, the players could bet on individual points.

Q All right, and more for purposes of the record than anything else, the element of chance provided in this game was provided by the tossing of dice, is that correct?

A That is correct.

Q Now, can you tell us, please, who was involved in the operation of the game that night?

A Yes. Paul Comfort was a dealer; Joe Zito worked; Charley Russo and a gentleman by the name of Sol who I was told would be working as a box man, and he had been brought in - -

MR. WALSH: I object to what he was told.

THE WITNESS: Mr. Russo told me - -

THE COURT: I will overrule the objection.

THE WITNESS:

Mr. Russo told me that Sol had been brought in because he had previously bank rolled crap games in the area and he would attract Jewish customers. Walt was the stick man and Joe Comfort was the kitchen man and Frank Ferrara was the door man; Joe Salerno also worked both as a dealer and as a ladder man.

BY MR. PARRY:

Q Now, would you, recognizing now that it has been some time, would you be able to tell us, please, what each of these individuals was paid out of the nut?

A Yes. With the exception of Walter and the door man, Ferrara, who got \$30, the other workers received \$35, with the exception of Joe Comfort who got \$10.

Q Now, the, - that accounts for what was paid to these people. When you were present observing the game, did you in fact witness bets being placed?

A Yes, I did.

Q And could you tell us, please, approximately in your, having, - strike that. As a result of having witnessed these bets being placed, could you tell us, please, approximately how much was wagered that evening?

A That evening, I would say that the bets on each roll of

the dice would vary from on the table three to four hundred dollars to five to six hundred dollars.

Q And were you able to arrive at any conclusion concerning the approximate total amount that was wagered that evening?

A I would say that the figure ran approximately thirty five thousand, conservative estimate.

Q Now, at the end of the evening, do you recall how much you had in terms of cash on hand?

A Yes. We had \$5,664.

Q And the amount that you had, what in addition now to paying the workers you have already told us about, what if anything, was done with that money?

MR. NEMOYER: I object. That calls for a conclusion unless he saw it or something.

THE COURT: He may explain it. Overruled.

THE WITNESS: The bank of \$5,000 was set aside for the previous nights operation and the profit for the night was \$334 was taken, set aside from the \$5,000 bank.

BY MR. PARRY:

Q Now, after the operation ended that evening, did you have occasion to meet with Mr. Russo and Mr. Comfort?

A Yes. We went to the bar in the bowling allies next door.

believe the witness said his memory - -

THE COURT:

He cannot remember, all right. Look
at it, please, Mr. Brana.

BY MR. PARRY:

Q Now, can you identify Government's Exhibit Number 1
for us, please?

A Yes, I can.

Q What is that document?

A This is a report prepared by me concerning my activities
on April 9th of 1973.

Q Now, you have had an opportunity to examine that
report?

A Yes, I have.

Q Can you tell us, please, does it refresh your recollection
as to what, if anything, Mr. Russo said to you concerning
the Good Guys on April 9, 1973?

A Yes. Mr. Russo - -

Q And can you tell us please, what, if anything, did Mr.
Russo say to you concerning the Good Guys on April 9,
1973?

A Mr. Russo told me the Good Guys said we would not have
to make any payments until we were able to get the
game off the ground.

Q Directing your attention now to the following day,

the dice would vary from on the table three to four hundred dollars to five to six hundred dollars.

Q And were you able to arrive at any conclusion concerning the approximate total amount that was wagered that evening?

A I would say that the figure ran approximately thirty five thousand, conservative estimate.

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Q And can you tell us please, what, if anything, did Mr.
Russo say to you concerning the Good Guys on April 9,
1973?

A Mr. Russo told me the Good Guys said we would not have
to make any payments until we were able to get the
game off the ground.

Q Directing your attention now to the following day,

April 10, 1973, did you have occasion on that date to meet with Mr. Russo?

A Yes, I did.

Q And where did this meeting take place?

A At a location between Batavia and Rochester, New York.

Q Was this Mama Mia's Restaurant?

A That's where Mr. Russo and I ended up together.

Q Now, at approximately 7:00 p.m., did you have occasion to go with Mr. Russo to Webster, the Webster Street location?

A Yes, I did.

THE COURT:

What date is this?

THE WITNESS:

April 10, 1973.

BY MR. PARRY:

Q Now, when you arrived at the location, what, if anything, happened when you were there?

A The crap game started shortly after we arrived.

Q Now, right after you arrived, did Mr. Russo and Mr. Comfort count out the money?

A Yes. The money was counted and the game started.

Q Now, did Mr. Zito arrive at any time during the course of that evening?

A He arrived at approximately 8:30.

Q And when you say the game was started, was this the

same game that you have previously described?

A Yes, sir.

Q Okay. In other words, the same rules and the same procedure, is that correct?

A Yes, sir.

Q Now, did you have occasion to speak with Mr. Russo in the office at Webster Street on this date?

A After about an hour the game slowed up and Mr. Russo and I went into the office and we spoke.

Q And can you tell us, please, what Mr. Russo told you during the course of that conversation?

A Yes. Mr. Russo stated that his brother ran the day crap game in Rochester and that he ran the night crap game in Rochester which started after 7:00 p.m. and he stated that only their family could run crap games in Rochester and that when the crap game was not being run that he had permission to run a Blackjack game. I also asked him whether or not Sammy G. had come up with the \$5,000 and he told me that he had not come up with the \$5,000.

Q Now, in regard to Sammy G., did Mr. Russo identify Sammy G. as being a member of the Good Guys?

A Yes, and he also stated that he had been there that evening.

THE COURT:

Excuse me. There is no objection

1 A Yes.

2 Q Can you identify that document for us, please?

3 A Yes. It is a report prepared by me of activities on
4 April the 10th of 1973.

5 Q Now, having examined Government Exhibit 2, is your
6 memory refreshed concerning the conversation that you
7 had with Mr. Russo?

8 A Yes.

9 Q Can you tell us, please, what, if anything, did Mr.
10 Russo tell you in the course of that conversation in
11 addition to that which you had already testified?

12 A Yes. Mr. Russo stated additionally that he would be
13 responsible for putting up bail money for anyone that
14 was arrested if there were a raid by the police and he
15 also stated that he had equipment and that he would be
16 ready to set up a new location the next day if he were
17 in fact hit by the police.

18 Q Now, on this date, did you have occasion to see the
19 defendant, Gingello?

20 A Yes, I did.

21 Q Now, could you point out Mr. Gingello in the courtroom
22 today?

23 A Yes. He has a brown suit on, sitting to the left of
24 the gentleman with the white hair at the defense table.

25 Q And again now, on April 10, 1973, what, if anything, was

Mr. Gingello doing when you saw him on that occasion?

A He was walking around and sitting in the location of the crap game.

Q Now, the game at this time was in operation, is that correct?

A Yes, it was.

Q Could you tell us, please, who the workers were at this time?

A The workers were Charles Russo, Paul Comfort, Joe Zito, Joe Salerno, Joe Comfort who was in the kitchen, Frank Ferrara who was the door man and myself.

Q Now, what function - -

A Excuse me, also Sol and Walter.

Q Do you recall what Sol was doing this night?

A Sol would have been the box man.

Q And what is the function of the box man?

A The function of the box man is to take the money from the dealer and to lay it out in a neat fashion and to supply the dealers with money if they are going down or take their money if they have too much money and to overall supervise the operation of the game.

Q And Joe Salerno who was also working that night?

A Yes, sir.

Q And what was his function?

A He worked both as a dealer and a ladder man.

Q First of all, what would the dealer do?

A The dealer would physically take the money off the table and cover the bets and put the bets on the numbers for the players when they indicated to the dealer what numbers they wanted to play.

Q You say he also functioned as a ladder man, is that correct?

A Yes, sir.

Q What does a ladder man do?

A The ladder man actually sits on a ladder. It gives him a better observation of the activities going on at the table. If there are a lot of people around the table it is difficult to see so he sits on a ladder to insure that the dealers are paying off the right sums.

Q And you have testified also that there was a fellow by the name of Walt who was present, is that correct?

A Yes. Walt would have been the stick man.

Q What does a stick man do?

A The stick man keeps the dice moving. Everytime the player throws the dice down he will bring the dice back and pass them back to the shooter until he makes his point or craps out.

Q Does he use anything to bring the dice back?

A Yes. He brings, - he uses a stick approximately 3 feet

long and it has a curved hook on it which catches the dice.

Q All right. Now, you testified also that Frank Ferrara worked also that night as a door man, is that correct?

A Yes, sir.

Q And what was the function of the door man?

A The door man keeps the door bolted and makes sure that nobody gets into the game except individuals that are known to the house and also in case the police hit the place, it is his responsibility to put the word out so that they can change the activities in the crap room site.

Q Also, you indicated that Joe Comfort worked that night.

A Yes, he did. He was the kitchen man preparing food, serving food, cigarettes, coffee.

Q Did Mr. Russo and Paul Comfort perform any function that evening?

A Yes. Mr. Russo would have been the box man or a dealer and Comfort would have been a dealer or stick man.

Q And each of these individuals to whom you have referred, they were paid?

A Yes, sir.

Q And by the way, you also received money?

A Yes, I did.

Q And what was the purpose of your accepting this money?

A Well, when I originally went out there I was, as far as

1 I understood, I was going to be the banker. On the
2 first night there Russo gave me the \$35 and I said I
3 didn't want it and he said that that is the money that
4 I was getting paid because I was there watching the
5 activities to make sure that everything was being
6 handled correctly.

7 Q And this was part of your undercover role, is that
8 correct?

9 A Yes, it was.

10 Q Now, when you were present during the course of the
11 evening, did you, as on the previous evening, witness
12 wagers being placed?

13 A Yes, I did.

14 Q And can you give us an estimate or, - strike that. Can
15 you tell us, please, the range of the bets on each roll
16 of the dice that you witnessed?

17 A The range of the bets would be on each roll between
18 three or four hundred to five or six hundred.

19 Q And can you tell us, please, approximately how much
20 was wagered that night, April 10, 1973?

21 A I would have to estimate \$35,000.

22 Q And at the end of the evening, can you tell us, please,
23 what the gross profit for that night was?

24 A I believe it was one thousand, nine hundred and some
25 odd dollars.

Q And were there any expenses in addition to the salaries that were paid?

A Yes. In addition to the expenses that particular night, Charles Russo took out \$400 for materials which had been expended in fixing up the club.

Q Directing your attention to April 11, 1973, did you have occasion on that date to return to 122-124 Webster Street?

A Yes, I did.

Q And did you go to Webster Street with anyone?

A I did, with Mr. Russo.

Q Now, when you arrived at Webster Street on that evening, did you have occasion to meet with anyone other than Mr. Russo?

A Yes, also Joe Zito.

Q And did you also meet with Mr. Comfort?

A I met with the other workers, yes.

Q What took place when you arrived at Webster Street that night?

A When we got there we counted the bank to be sure that the \$5,000 was there. The \$5,000 was and we started the game.

Q Now, in the course of the evening, - strike that. When you say that the game began, was this the same type of game you previously described?

A The same game we run the previous two evenings.

Q And the procedures and the rules were the same?

A Yes, they were.

Q Now, can you tell us who the workers were that evening in the game?

A Yes, they were Joe Zito, Charles Russo, Paul Comfort, Joe Comfort, Sol, Walter and the door man that night was Bill Barton.

Q Now, can you tell us, please, what function did Mr. Russo have that evening?

A He could have acted as a box man and as a dealer.

Q And what function did Mr. Salerno have?

A Mr. Salerno would have been a dealer or a ladder man.

Q And what function did this fellow by the name of Sol -

A Sol would have been a box man.

Q And the individual you refer to as Walt, what function did he have?

A Walter was a stick man.

Q What function did Paul Comfort have?

A Paul Comfort was a dealer and also a stick man.

Q And Billy Barton?

A Door man.

Q And what function did Joe Comfort have?

A He was the man in the kitchen.

Q And were each of these individuals that you referred to, were they paid for their services?

1 A They were all paid the same as the salaries on the
2 previous two nights.

3 Q And you also were paid?

4 A Yes, I was.

5 Q How much were you paid, by the way?

6 A \$35.

7 Q And that was the same on the other evenings?

8 A Yes, sir.

9 Q Now, at the end of the evening, - well, strike that.

10 W you present while this game was being played?

11 A Yes, I was.

12 Q And can you tell us, please, the range of the bets on
13 each roll of the dice?

14 A The range would have been the same as the previous
15 evening, running from three-forty to five hundred, six
16 hundred per roll and once again the total handle, the
17 gross for the night would have been approximately
18 \$35,000.

19 Q Now - -

20 THE COURT:

Excuse me, Mr. Brana, about how
many players would there be?

21 THE WITNESS:

That would vary. Sometimes there
would be fifteen players around the
table. Other times there would be ten.

he did it.

Q Now, did you have occasion on that night to see the defendant, Gingello?

A Yes, I did.

Q this was at the Webster Street location?

A At the crap game location, yes.

Q And when you observed Mr. Gingello, what, if anything, was he doing?

A He was walking around in the location.

Q Now, on that evening, did you have occasion to speak with Mr. Zito?

A Yes, I did.

Q And can you tell us, please, what you were told by Mr. Zito?

A Mr. Zito told me that Gingello had spoken to Charley Russo and asked Russo who was Paul, where did he come from, how come he got into the game?

Q That is, who you were?

A Who I was, yes, sir.

Q And what, if anything, was said concerning a meeting that was to take place the following night?

MR. BOREANAZ: Excuse me, your Honor. I object to the leading.

THE COURT: All right. Sustained.

Gingello that it should not be considered and that is why I have sustained the objection.

BY MR. PARRY:

Q Mr. Brana, directing your attention now to the following day, April 12, 1973, did you have occasion on that date to meet with Mr. Russo?

A Yes, I did.

Q And where did this meeting take place?

A Between Batavia and Rochester, New York.

Q When you say "between Batavia and Rochester, New York", was it on the Thruway?

A It was off the highway, yes, sir.

Q And did you go anywhere with Mr. Russo that day?

A Yes. Mr. Russo and I went to the Webster Street location.

Q Okay. Approximately what time did you arrive?

A Approximately 7:00 o'clock. The lights on the location were off that night. We were advised that the lights weren't working. Within a half an hour Joe Salerno was able to fix the lights and a number of individuals who were in the club, left at that time. At approximately 8:00 o'clock the game was started. That is, the crap game was started with the same workers that had been there

1 the previous night with the exception that Joe Zito
2 did not show up until approximately 8:30.

3 Q Now, prior to Mr. Zito's arrival, were any of the
4 defendants present at the location?

5 A Sammy G. was there.

6 Q And this is Mr. Gingello?

7 A Yes.

8 Q And you have stated also you arrived with Mr. Russo.
9 Approximately what time did Mr. Zito arrive?

10 A At approximately 8:30.

11 Q And what, if anything, did Mr. Zito do when he arrived
12 at the club?

13 A He went to work.

14 Q Now, when you say Mr. Zito went to work, what was his
15 function that evening?

16 A Well, I recall specifically that he was on the ladder
17 that night and he probably also worked as a box man.
18 I am sorry, - yes, as a box man.

19 Q Now, did there come a time when Mr. Zito ceased working
20 and did something else?

21 A Before he started work he went into the office with
22 Charles Russo and at approximately 9:00 o'clock Sam
23 Gingello and Red Russotti entered the crap game site
24 and they both went into the office where Mr. Zito and
25 Mr. Russo were.

MR. NEMOYER:

Thank you.

BY MR. PARRY:

Q Approximately, - well, what, if anything, did you next see in regard now to the office?

A Mr. Gingello and Russotti came out of the office and left the crap room site and shortly thereafter Russo and Zito came out of the office.

Q Now, at this time, can you tell us approximately how long did this meeting in the back room or the office at the Webster Street location take place?

A Approximately ten minutes.

Q Now, after Mr. Zito came out of the office, what, if anything, did he do?

A He spoke to me briefly. I could tell that there was trouble.

MR. NEMOYER:

Your Honor, I would object.

THE COURT:

All right. Strike out "I could tell there was trouble".

BY MR. PARRY:

Q Did Mr. Zito then proceed to go to work in the game?

A Yes, he did.

Q And can you tell us, please, was this the same game that you have previously described?

Yes, sir.

And who were the workers in the game that night?

The workers were Walter, Sol, Paul Comfort, Joe Comfort, Joe Zito, Charles Russo and Bill Barton who was the door man and myself.

Now, can you tell us, please, in regard to this individual you have referred to as Sol, what was his function that night?

He was the box man.

And how about Walter?

Walter would have been stick man.

And in regard now to Paul Comfort, what was his function?

Paul Comfort was a dealer and a stick man that night.

And how about Mr. Russo?

Mr. Russo would have been a dealer.

And Joe Salerno.

He would have been a dealer.

MR. WALSH: I will object to that. He didn't have Salerno there.

THE COURT: That is a jury question, whether Salerno is there or not. Mr. Parry, next question.

BY MR. PARRY:

Q In regard now to Billy Barton, what was his function?

1 A He was the door man.

2 Q And what was Mr. Zito's function that night?

3 A Ladder man.

4 Q And in regard to Joseph Comfort, what was his function?

5 A He was the kitchen man.

6 Q And while you were present, did you observe people
7 placing bets that evening?

8 A Yes, sir.

9 Q And can you tell us, please, what the approximate
10 range was on each roll of the dice?

11 A The range that night would have been a little higher
12 than the previous night, from approximately four or
13 five hundred to six or seven hundred on each roll.

14 Q And can you tell us what the approximate total of the
15 betting action was for that night?

16 A I would estimate to have been \$40,000.

17 Q And at the end of the evening, was there a profit?

18 A No, there was not.

19 Q And can you tell us the status of the \$5,000 which you
20 had originally put up for this game?

21 A The \$5,000 was now depleted and at the end of the night
22 we ended up with \$3,550.

23 Q And each of the individuals that you have referred to
24 as having been workers in this game, were they paid
25 for their services that night?

Yes, sir, they were.

And you also received money that day?

Yes, I did.

How much was that?

\$35.

Now, after the money was, - well, strike that. You said that you had \$3,550 left over at the end of the evening, is that correct?

That is the total that was left that night. I had twenty-five fifty.

All right. That was from the original five thousand you put up?

Yes, sir.

And there had been some profits made the previous evenings?

Yes.

And where do you derive - -

\$1,000 from the previous night's profits had been put into the operation that particular night.

All right. Now, after the money had been settled up that evening, what, if anything, did you and Mr. Zito do? Mr. Zito and I left the location. He handed me the keys for the car which was rather unusual and I asked him why he was handing me the keys.

• NEMOYER:

Your Honor, I object to any conversa-

tion between he and Mr. Zito.

1 Q Is it Special Agent Desvernine and Special Agent
2 Schaller?

3 A Yes.

4 Q And did you initiate this contact or did they?

5 A They did.

6 Q Can you tell us, please, when they first initiated
7 this contact with you?

8 A The day I got sentenced.

9 Q What day was that, do you know?

10 A The 1st of January of 1973.

11 Q That is the first part of January?

12 A Yes.

13 Q Now, approximately over how long a period did your
14 contact with Special Agents Desvernine and Schaller
15 continue for?

16 A For about a month, six weeks.

17 Q And during this month or six week period were you
18 actively cooperating with these Special Agents?

19 A No, I wasn't.

20 Q Did there come a time after this month or six week
21 period that you have referred to that you did begin
22 to cooperate with the FBI?

23 A Yes, I did.

24 Q And that, - what form did that cooperation take? That
25 is, what did you begin to do for the FBI?

1 A Give them information on my past, the people I was
2 associated with.

3 Q Now, in regard to the information that you gave the
4 FBI, - well, strike that, strike that. During this
5 period now in January of 1973, did you have occasion
6 to become an associate of one Charles Russo?

7 A Yes, I did.

8 Q Had you known Mr. Russo prior to this time?

9 A Yes, I did.

10 Q Approximately how long had you known Mr. Russo?

11 A 15, 20 years.

12 Q Okay. Now, the Russo we are referring to, do you see
13 him in the courtroom today?

14 A Yes, I do.

15 Q Would you point him out, please.

16 A With the black suit and the polka dot tie.

17 Q For the record, the witness has identified the
18 defendant, Charles Russo. Now, did you also have
19 occasion to become associated with one Paul Comfort?

20 A Yes, I did.

21 Q How long had you known Mr. Comfort?

22 A Three or four years.

23 Q This is prior to January of 1973?

24 A Yes.

25 Q Now, in regard to the activities of Mr. Russo and Mr.

1 Comfort, you say that in January of 1973 you became
2 associated with them in some further sense, is that
3 correct?

4 A Yes.

5 Q And can you tell us, please, just what it was that
6 you undertook with Mr. Russo and Mr. Comfort in January
7 of 1973?

8 A Operating a crap game in Rochester on Jay Street.

9 Q Now, at the time that, - in January of '73 when you
10 became involved in the operation of this crap game,
11 you say the location was on Jay Street, is that correct?

12 A Yes, it was.

13 Q Now, how was it that you were able to become one of
14 the operators of this crap game?

15 MR. NEMOYER: Your Honor, I object to that. Calls
16 for a conclusion.

17 THE COURT: I will permit it. Overruled.

18 THE WITNESS: Would you repeat the question,
19 please.

20 THE COURT: Do you mean, did you have some
21 conversation with Mr. Russo about what
22 they were going to do about the game?

23 BY MR. PARRY:

24 Q Or what his role was to be.
25

1 A They were broke in a crap game and I came into some
2 money and I put it up in the crap game and participated
3 in it.

4 Q Now, how much money did you give to Mr. Russo?

5 A \$3,000.

6 Q And approximately when did you give this money to them?

7 A Towards the later part of January.

8 Q And where did this money come from that you gave to him?

9 A I had a fire in my house and I received some insurance
10 money.

11 Q Now, at the time that you invested \$3,000 in this game
12 on Jay Street, did Mr. Russo or Mr. Comfort invest
13 any money?

14 A They invested the same amount as I did between the
15 both of them.

16 Q That is, they each invested \$1,500?

17 A Yes.

18 Q Now, did you thereafter attend the operations of this
19 game on Jay Street?

20 A Yes.

21 Q Can you tell us, please, approximately how many nights
22 did this game operate?

23 A Six nights a week.

24 Q What nights were they, do you know?

25 A Monday through Sunday.

1 Q Well, let me ask you this - -

2 A Saturday.

3 Q What night did they not operate?

4 A Saturday.

5 Q Okay. Now, directing your attention, - well, strike
6 that. In regard to this game now that operated six
7 nights a week, could you tell us, please, who some of
8 the employees from this game were?

9 A Charley and myself, Paul Comfort, Joe Salerno, Frank
10 Ferrara and the stick man, Walt and Paul Comfort's
11 father.

12 Q This Charley that you have referred to, is that Charley
13 Russo?

14 A Yes.

15 Q And what was Paul Comfort's father's name, do you know?

16 A Joe.

17 Q And what was Mr. Russo's function in this game?

18 A Charley Russo?

19 Q Yes.

20 A Well, he dealt. He was a dealer.

21 Q What does a dealer do?

22 A He pays off the bets when they win and lose.

23 Q And what was Mr. Comfort's function in this game?

24 A Same thing.

25 Q And in regard now, Walt, the stick man, what did Walt

- 1 Q Well, let me ask you this - -
- 2 A Saturday.
- 3 Q What night did they not operate?
- 4 A Saturday.
- 5 Q Okay. Now, directing your attention, - well, strike
- 6 that. In regard to this game now that operated six
- 7 nights a week, could you tell us, please, who some of
- 8 the employees from this game were?
- 9 A Charley and myself, Paul Comfort, Joe Salerno, Frank
- 10 Ferrara and the stick man, Walt and Paul Comfort's
- 11 father.
- 12 Q This Charley that you have referred to, is that Charley
- 13 Russo?
- 14 A Yes.
- 15 Q And what was Paul Comfort's father's name, do you know?
- 16 A Joe.
- 17 Q And what was Mr. Russo's function in this game?
- 18 A Charley Russo?
- 19 Q Yes.
- 20 A Well, he dealt. He was a dealer.
- 21 Q What does a dealer do?
- 22 A He pays off the bets when they win and lose.
- 23 Q And what was Mr. Comfort's function in this game?
- 24 A Same thing.
- 25 Q And in regard now, Walt, the stick man, what did Walt

- 1 the stick man do in this game?
- 2 A When the customers threw the dice he raked them back in.
- 3 Q And Joe Comfort, what was his function?
- 4 A He made coffee and sandwiches and kept the place clean.
- 5 Q How about Joe Salerno, what was his function?
- 6 A He dealt and he was on the stick and various things
- 7 it takes to operate a game.
- 8 Q Now, this was a dice game, was it not?
- 9 A Yes, it was.
- 10 Q Now, in addition to having put up money for this game,
- 11 did you have any function in regard to its operation?
- 12 A I worked also. I was on the box.
- 13 Q Okay. What do you mean, you were on the box? What
- 14 exactly did you do?
- 15 A Oh, made change and usually have the bank roll in front
- 16 of you and just sitting watching things.
- 17 Q Now, while you were a partner in this operation or this
- 18 game, did you have occasion to speak with Mr. Russo
- 19 concerning the operation of the game?
- 20 A Yes, I did.
- 21 Q And in particular now, did you have occasion to speak
- 22 with Mr. Russo concerning the expenses of the operation
- 23 of the game?
- 24 A We did, before I got involved in it.
- 25 Q Okay, and what did Mr. Russo tell you concerning the

1 explaining to Mr. Zito where the money
2 is going to go and one of the places it
3 is going to go is to Mr. Gingello as one
4 of the Good Guys for the purpose of
5 obtaining the franchise, so to speak, to
6 operate the game.

7 THE COURT:

I will sustain the objection to
8 that testimony. I think you need more
9 in this case before we can start using
10 hearsay as far as Gingello or Russotti
11 are concerned because once you get it in,
12 you cannot get it out and I think after
13 you really, - if you get Russotti and
14 Gingello participating in the financing,
15 managing of some part of this thing with
16 some direct proof, then we can back up
17 and take the hearsay but I do not think
18 we should take it first.

19 MR. PARRY:

All right. We will proceed in
20 that manner.

21 (Sidebar conference concluded.)

22
23 BY MR. PARRY:

24 Q Mr. Zito, were you ever present during the operation
25 of this game on Jay Street when Mr. Gingello was present?

20

1 A Yes, I was.

2 Q And the Mr. Gingello that I am referring to, do you see
3 him in the courtroom today?

4 A Sitting over there with a brown pin stripe suit on.

5 Q For the record, the witness has identified the defendant,
6 Salvatore Gingello. Now, on these occasions when you
7 saw Mr. Gingello at the Jay Street location, do you
8 recall what night of the week it was that you saw him?

9 A I don't.

10 Q Is there any document which would refresh your recollec-
11 tion as to what night of the week you saw Mr. Gingello;
12 any document you could refer to which would refresh
13 your recollection in that regard?

14 A Well, I recall seeing him a couple times on a Sunday
15 usually he came down.

16 MR. BOREANAZ: I am sorry. I move to strike that,
17 your Honor. It is not responsive.

18 THE COURT: It is not really responsive. Mr.
19 Zito, I think it is better to listen to
20 the question and only respond to the
21 question. Mr. Parry asked you if there
22 was any document which could refresh your
23 recollection and then you said "Well, I
24 recall that he came around on a Sunday",
25 which was an answer, I suppose, to the

44

1 prior question, so what we will do is,
2 I will overrule your objection and we
3 will continue.

4 MR. PARRY: All right. In light of the witness
5 answer, I will withdraw the previous
6 question.

7 THE COURT: Very well.

8
9 BY MR. PARRY:

10 Q You say that you saw him on a couple of occasions on
11 Sunday evenings?

12 A That's right.

13 Q And on those occasions, can you tell us, please, what
14 Mr. Gingello did or what you saw?

15 A Well, the couple times I did see him I was in what we
16 call our office in the crap room and he came in there
17 and seen Charley and I was sitting there and I just
18 seen Charley passing some money.

19 Q Now, at the time that Mr. Russo paid this money over
20 to Mr. Gingello, was there any conversation?

21 A Nothing that I can recall at that moment but I, - just
22 gave him the money and that was it.

23 Q Do you recall how much money Mr. Gingello received from
24 Mr. Russo on these occasions?

25 A Yes, I know the amount it was because I was aware of the

1 amount he was giving him.

2 Q Okay. What was the amount?

3 A It was a hundred dollars a night for every night we
4 operated.

5 Q You say it was a hundred dollars a night for every
6 night you operated. What was your understanding
7 concerning the purpose of this money that was paid
8 to Mr. Gingello?

9 MR. NEMOYER: Your Honor, I object to any testimony
10 about what was his understanding.

11 THE COURT: All right. I will sustain the
12 objection.

13
14 BY MR. PARRY:

15 Q Mr. Zito, in the course of your operating or participating
16 in the operation of this game on Jay Street, did you
17 ever hear the term "Ice" used?

18 A Yes, I did.

19 Q And what is your understanding of the term "Ice"?

20 A When you pay somebody off.

21 Q Well, you pay them for what?

22 A To have the okay to run to operate a gambling business.

23 Q Now, in your understanding, does the term, "Ice" apply
24 only to payments to police officers or can that mean
25 payments to anyone for this privilege?

1 MR. NEMOYER:

Your Honor, I object to what his
2 understanding of the term, - what his
3 understanding is.

4 THE COURT:

Sustained.

5
6 BY MR. PARRY:

7 Q Did you, in the course of participating in the operation
8 of this game on Jay Street, ever discuss with Mr. Russo
9 the need for making payments to the police?

10 A Yes, I did. He made me aware of all the expenses we
11 were going to incur before we operated, before I got
12 involved in it.

13 Q Did you ever observe any payoffs to the police?

14 A No, I didn't.

15 Q Did you ever observe police officers on the premises
16 at the Jay Street location?

17 A Yes, I did.

18 Q Do you know the names of these police officers?

19 A No, I don't.

20 MR. WALSH:

Your Honor, I object to all of this
21 as leading. Each question elicits a
22 "yes" or "no" answer from the witness.

23 THE COURT:

I will overrule the objection. The
24 answer has been given, but, Mr. Parry,
25 at least one or two of those questions

1 were leading.

2

3 BY MR. PARRY:

4 Q Yes, sir. Could you tell us, please, approximately
5 how many times you saw police officers on the premises
6 at Jay Street?

7 MR. WALSH: Same objection.

8 THE COURT: Overruled.

9 THE WITNESS: In the course of two months I have
10 seen them six, seven times, eight times.

11

12 BY MR. PARRY: •

13 Q On these occasions when you saw the police officers on
14 Jay Street, what, if anything, were they doing?

15 A They would come up there and they would ring the buzzer
16 and let us know the police were coming and we would
17 clear off the crap table and they would go into the
18 office and when the police officer came up he would go
19 in the office with either Paul or Charley.

20 Q The police officers would go into the office with either
21 Paul Comfort or Charley Russo?

22 A That's correct.

23 Q And were you ever present in the office when Mr. Russo
24 or Mr. Comfort were in the office with these police
25 officers?

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1 A No, I wasn't.

2 Q How long would the police officers remain in the office?

3 A Five minutes.

4 Q And what would happen next?

5 A They would leave and then we would start the crap game
6 up again.

7 Q Directing your attention to early March 1970, can you
8 tell us, please, what happened in regard to the finances
9 of the Jay Street game?

10 A We were broke again.

11 MR. NeMOYER: I believe it is 1973, Judge.

12 THE COURT: 1973. Thank you, Mr. NeMoyer.

13 MR. PARRY: Whatever I said, I take it back.

14 THE COURT: All right.

15

16 BY MR. PARRY:

17 Q At that time, approximately how much money did you put
18 into this game?

19 A About \$7,000.

20 Q And would the same also be true for Mr. Russo and for
21 Mr. Comfort?

22 A Yes, sir.

23 Q Now, I believe that you testified that the bank roll
24 of this game had run out, is that correct?

25 A That's correct.

1 Q What, if anything, did you do when you determined that
2 the bank roll of the game at the Jay Street location
3 had become exhausted?

4 A We started looking around for bank roll money.

5 Q Now, at about this time, - well, strike that. Can you
6 tell us, please, whether or not this was during the
7 period when you were being contacted by the FBI?

8 A Yes, it was.

9 Q Did there come a time when you advised the FBI that the
10 Jay Street game was out of money?

11 A I did.

12 Q And will you tell us, please, - strike that. Thereafter,
13 did there come a time when you were introduced to one
14 Special Agent Paul Brana of the FBI?

15 A Yes, I was.

16 Q Approximately when did that occur?

17 A The latter part of March.

18 Q And where did this meeting take place?

19 A In Batavia.

20 Q Where in Batavia?

21 A At the Holiday Inn as Batavia, New York.

22 Q Now, at the time that you met with Mr. Brana, were you
23 aware that he was a Special Agent of the FBI?

24 A Yes, I did.

25 Q And what, if anything, were you and Mr. Brana to under-

1 take together?

2 A They decided to bring Paul Brana in as an undercover
3 agent and pass him off as a mob guy to get into the
4 crap game in Rochester.

5 Q Was Mr. Brana using any particular name?

6 A Yes, Paul Becera.

7 Q And how would Mr. Brana be passed off as an underworld
8 figure; who was going to do that?

9 A I was going to introduce him as a friend of mine from
10 New York.

11 Q Who did you propose to introduce him to?

12 A To Charley Russo.

13 Q Now, thereafter did you, in fact, contact Mr. Russo?

14 A I did.

15 Q And approximately how long after this meeting in
16 Batavia did that take place?

17 A Three or four days later.

18 Q Where did your meeting with Mr. Russo take place?

19 A In Caledonia, New York in a restaurant.

20 Q Would that be on approximately March 31, 1973?

21 A The last of the month.

22 Q And at that time, who was present?

23 A Paul Brana, Charley Russo, Charley's wife and myself.

24 Q Now, did there come a time during this meeting when
25 Mr. Russo's wife left the table?

1 A Yes, she did.

2 Q And can you tell us what, if anything, transpired when
3 she left the table?

4 A I told Charley that Paul was interested in bank rolling
5 the game and to give him the details of what the
6 operation consisted of and Charley explained it to him.

7 Q Was there any discussion of money?

8 A Yes, there was. Charley, - Paul was going to put up
9 five thousand and he was going to get 70 per cent of
10 the profit for putting up the five thousand.

11 Q What, if any, discussion was had, relative to the
12 expenses attendant to the operation of this game?

13 A That would come off the top.

14 Q And what were some of these expenses?

15 A The upkeep of the, - paying of the dealers and stick
16 men and people who took care of it and if there was
17 any vice to take care of the people in Rochester.

18 Q When you say "If there was any vice", what do you mean
19 by that?

20 A The Vice Squad.

21 Q The Rochester Police Vice Squad?

22 A Yes.

23 Q And also you said there was discussion concerning
24 taking care of the people in Rochester?

25 A Right.

1 Q What do you mean by that?

2 MR. NEMOYER: Your Honor, I object to any of this
3 conversation outside the presence of my
4 client between Mr. Zito and I understand
5 Mr. Russo and my client is not there.

6 THE COURT: I have not heard anything about your
7 client so I will overrule the objection.

8 MR. BOREANAZ: Your Honor, I join in the objection.
9 I think we are entitled to have a
10 conversation come in at a given time or
11 a definable time and place and a witness
12 tell us the conversation.

13 THE COURT: I agree with that. Mr. Parry, you
14 are starting to lead. Pin it down. Next
15 question, please.

16
17 BY MR. PARRY:

18 Q Did there come a later time, - strike that. Directing
19 your attention now to April 2, 1973, did you have
20 occasion on that date to meet with Mr. Russo?

21 A I talked to him by phone that day.

22 Q And when you spoke with Mr. Russo on that day, what,
23 if anything, did you say to him and what did he say to
24 you?

25 A I told him that Paul Becera was going to put up \$5,000

1 and he was coming in that night on the 6:00 o'clock
2 plane and I was meeting him at 8:00 o'clock in Rochester.

3 Q Now, thereafter, did you go to the Rochester Airport?

4 A Yes, I did.

5 Q Approximately what time?

6 A 5:30 in the afternoon.

7 Q And did you meet with Special Agent Brana at that time?

8 A He came in on a plane, but prior to that, Charley Russo
9 met me at the Airport.

10 Q Now, when you met with Mr. Russo at the Airport,
11 Special Agent Brana had not yet arrived at that point?

12 A Not yet.

13 Q Okay. What, if anything, did Mr. Russo tell you at
14 that time?

15 A I was sitting having coffee in the coffee shop and he
16 came over and told me that he had some bad news and I
17 asked him what it was and he said that he was talking
18 to Red and Sammy and that Sammy - -

19 THE COURT: Just a minute, Mr. Zito.

20 MR. NEMOYER: Your Honor, I object to this
21 conversation between Mr. Russo and Mr.
22 Zito and references made to my client is
23 hearsay as far as my client is concerned.

24 THE COURT: I will sustain the objection.

25 MR. NEMOYER: Thank you, Judge.

1 BY MR. PARRY:

2 Q Mr. Zito, after this conversation that you had, - or
3 strike that. Without getting into the reference as to
4 who told him what, what, if anything, did Mr. Russo
5 tell you concerning the Jay Street location?

6 A That it wasn't available anymore and that we were going
7 to get another place on Webster Avenue.

8 Q Now, after this conversation, did Special Agent Brana
9 arrive?

10 A He did on the 6:15, 6:00 o'clock or 6:15 plane.

11 MR. PARRY: May I have just a moment, your Honor.

12 THE COURT: Surely.

13
14 BY MR. PARRY:

15 Q After Special Agent Brana arrived, did Mr. Russo, -
16 what, if anything, did Mr. Russo tell Special Agent
17 Brana about the availability of the Jay Street location?

18 A He told him the same thing he told me, that Jay Street
19 wasn't available, they were going to put a Union Hall
20 up there and we would have the Webster Avenue place in
21 about a week or so.

22 Q Directing your attention now to the following day,
23 April 3, 1973, did you have occasion to receive a
24 telephone call from Mr. Russo?

25 A Yes, I did. He told me he got the key from - -

1 A Yes.

2 Q And when you returned, did you meet with Special Agent
3 Brana?

4 A Yes, I did.

5 Q At the time that Mr. Russo met with Special Agent Brana,
6 what, if anything, did he tell Special Agent Brana about
7 when the game would start operating?

8 A That it would start the following day which is a Monday
9 at 7:30 or 8:00 o'clock at night.

10 Q And what, if anything, did Mr. Russo say to Special
11 Agent Brana concerning the need to pay off the police
12 in that area?

13 A He said it won't be necessary at this moment right now,
14 that the police that we were paying off on the other
15 side of town wasn't covering that section we were in.

16 Q Now, prior to your meeting with Special Agent Brana
17 with Mr. Russo in the bowling alley bar, going back now
18 to the meeting you had with Mr. Russo at the Webster
19 Street location, did you have a discussion with him
20 there about payments to the police?

21 A Yes, I did.

22 Q And can you tell us, please, what Mr. Russo said at
23 that location about the necessity or lack of necessity
24 for making payments to the police?

25 A He said it wouldn't be necessary at this time, we pay

1 the same vice police officer as we were at the other
2 location because they were on the other side of town and
3 if there was any police involved here we would know in
4 a few days.

5 Q Now, going back to the subsequent meeting between you,
6 Mr. Russo and Special Agent Brana at the bowling alley
7 bar, did Mr. Russo make any statement in your presence
8 concerning the relationship between the owner of the
9 bowling alley and the local police?

10 A Yes, he did. He said the bowling alley owner was a
11 friend of his and knew the captain in the precinct.

12 Q And what, if anything, was he to do in regard to the
13 captain at that precinct?

14 A The bowling alley manager was supposed to talk to the
15 captain and if there was anything, you know, anything
16 to resolve, any problem he would take care of it for
17 Charley.

18 Q Now, directing your attention to April 9, 1973, did
19 you have occasion on that date to meet with Special
20 Agent Brana?

21 A Yes, I did.

22 Q Where did that meeting take place?

23 A In Batavia, New York.

24 Q And again this was at the Holiday Inn?

25 A Holiday Inn.

1 there and it was like a little hallway with a pop
2 machine, candy machine and things like that and you
3 went around through the kitchen area into the game room.

4 Q Now, where was the office in relation to the game room?

5 A Behind it, towards the front of the building.

6 Q And was that walled off?

7 A Yes, it was.

8 Q Was there a door that could be opened and closed?

9 A Right.

10 Q Now, you say that Mr. Russo and Mr. Brana came from
11 the men's room and they went to the office, is that it?

12 A Yes.

13 Q Now, who was present in the office?

14 A Charley Russo, myself and Paul Comfort.

15 Q Where was Special Agent Brans?

16 A He was in the big room. He joined us shortly after
17 we started counting the money.

18 Q Now, in regard to this meeting that took place in the
19 office, did Mr. Russo make any statement with regard
20 to additional personnel that were going to work at
21 the game?

22 A Well, I was the one that brought it up. I seen Sol
23 Sharfstein there and I asked what he was doing there
24 and he said he put him on the payroll as a box man to
25 draw some clientele with money and I told him he should

1 tell Paul about it, make him aware of any change in
2 plans or anything like that.

3 Q Now, after the \$5,000 was counted out in the office,
4 where did you and Mr. Russo go?

5 A The crap game, the crap table.

6 Q And did the game then get underway?

7 A Yes, it did.

8 Q Will you tell us, do you recall who worked on the game
9 that night?

10 A Paul and Charley were the dealers. Solly was on the
11 box and Wally was on the stick and I was on the ladder.

12 Q Now, in regard now to this term you use "the box",
13 can you describe it for us?

14 A It sits in the center of the table, well, like a cigar
15 box where you put all your old bills in it.

16 Q And what is it used for, what is its purpose?

17 A To keep the old bills so they are not back in the game
18 and so you can handle the money a lot faster when you
19 have newer bills and your bigger bills are in there also
20 too.

21 Q Well, in regard now to the game, could you describe
22 the procedure that the box man would follow when the
23 game is being played; what would he do with the money,
24 what would he do with the box physically?

25 A Well, it would always stay in front of him and he

1 would keep an eye on the dealer to see they paid off
2 and the dealer didn't pay extra money off and cheated
3 the house and he would take all the old bills off the
4 table and put them in there and make change for the
5 customers.

6 Q Now, you used another term here also, "a stick man".
7 You say the stick man returned the dice?

8 A To the customers.

9 Q To the customers, okay, and how did he go about that;
10 what did he do to return the dice?

11 A He used a stice that looks like a cane, retrieved the
12 dice from the opposite end of the table where the
13 players shot them.

14 Q Do you recall whether or not, - or strike that. What
15 did you do that evening?

16 A I was on the ladder.

17 Q And what does the ladder man do?

18 A He does about half the work the box man does. He just
19 watches the action at both ends of the table.

20 Q Did anyone else work the ladder that night?

21 A Yes, Joe Salerno.

22 Q You alternated?

23 A Yes.

24 Q Did you have anyone that evening working the door?

25 A Yes, Frank Ferrara. He is president of our club there.

- 1 Q Now, what is the function of the door man?
- 2 A Not to let any police in or unwanted guests.
- 3 Q Was there a lock on the front door?
- 4 A It was bolted all the time.
- 5 Q Can you describe how it was that the door man kept
- 6 watch?
- 7 A Well, he stood out in the front door with the lights
- 8 off and just keeping his eye on the street there and
- 9 any activities going on outside.
- 10 Q Was there any alarm system at the Webster Street
- 11 location?
- 12 A We had a buzzer.
- 13 Q Was that activated by the door man?
- 14 A Yes.
- 15 Q Do you recall whether or not Joe Comfort was there
- 16 that night?
- 17 A Yes, he was.
- 18 Q And what was his function?
- 19 A Making sandwiches and coffee and keeping the place
- 20 clean.
- 21 Q Approximately how late did the game go that night?
- 22 A Oh, two hours, two and a half hours.
- 23 Q What time did it start, do you recall?
- 24 A A little after 8:00, 8:30, around there.
- 25 Q And were you present when people were placing bets?

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1 A Yes, I was.

2 Q Before we get to that, however, can you tell us, please,
3 what the mechanics of this game were? You had a table,
4 is that right?

5 A Yes, sir.

6 Q And can you describe that table for us?

7 A It is a little bigger than, - well, actually it is a
8 pool table, four and a half by nine pool table. That
9 is what it actually is and it has just got sideboards
10 to plug the holes in the table and it has a layout on
11 it and it has got a board on it, you bet right or
12 wrong or the hard way or sevens coming out or any way
13 you want to shoot the action.

14 Q Now, in regard to these markings on the table, what
15 did they consist of?

16 A They had numbers on them, fours, sixes and eights and
17 fives and nines or if you want to bet coming out or
18 against the dice or with the play, with the customer,
19 you can gamble any way you want, don't make no difference.

20 Q And was there a come line on the table?

21 A Yes. They had a do line and a don't line.

22 Q All right. Now, in regard to that, can you explain
23 what you mean by that term?

24 A Well, if you bet on a do line, that means that you
25 are betting with the player or if you are betting on

1 the don't line you are betting against the shooter.

2 Q Okay, and when you say "bet with the player" what do
3 you mean by that term?

4 A The fellow that is shooting the dice, you know, if he
5 rolls and he makes passes and if you bet the don'ts,
6 you hope he don't make it.

7 Q Now, what about these numbers, can you place bets on
8 those particular numbers?

9 A Yes, on the first roll of the dice you can bet a four,
10 a five or a six or an eight, nine or a ten.

11 Q Now, you say that for part of the evening you served
12 as a ladder man, is that correct?

13 A Right.

14 Q Approximately how long during the course of the evening
15 did you serve as a ladder man?

16 A Approximately half of the time. We work a half hour
17 on, a half hour off and everybody would rotate.

18 Q Now, while you were there working as a ladder man
19 could you give us an estimate of the range of the
20 bets that were placed on each roll of the dice from
21 the smallest to the largest?

22 A Oh, they bet fives, tens and twentys and if they got
23 hot and they passed, there would be more action because
24 they are gambling with house money.

25 Q Now, you are talking now in terms of the individual

1 bettors, is that right?

2 A Right.

3 Q On each roll of the dice, however, there would be more
4 than one bettor, would that be a fair statement?

5 A Yes.

6 Q Can you tell us what the total bets were per roll of
7 the dice; that is, how much were all the bettors putting
8 down per roll of the dice, a range, an approximate
9 range.

10 A It could vary from three to five hundred on the first
11 roll. If they make that point, the next roll could
12 be five thousand on it, all depends if they were pressing.

13 Q Now, in regard to all of the bets that were placed
14 that night, can you give us an approximate figure as
15 to what was placed or what was bet?

16 A Pretty hard, but it runs into the thousands.

17 Q Well, tens of thousands or what?

18 A Well, there is a lot of money being passed but it is
19 not going all in one direction. It is going back and
20 forth. In the course of two hours play you can handle
21 thirty or forty thousand.

22 Q Would that be your estimate?

23 A Yes.

24 Q Now, in regard to the mechanics of the game now, you
25 have described the process whereby the players would

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1 bet, is that correct?

2 A Right.

3 Q Who are they betting with or against?

4 A Everybody was betting against the house. It is a
5 Vegas type style. They don't bet against each other.
6 It is against the house.

7 Q And that was, - well, strike that. Now, you say that
8 after about two and a half hours the game was closed,
9 is that correct?

10 A That's correct.

11 Q And what, if anything was done with the money at the
12 end of the evening?

13 A We all took it back to the office and counted it up.

14 THE COURT: When you say "we took it back",
15 who would that be?

16 THE WITNESS: Charley Russo, Paul Comfort and
17 Paul Brana and myself.

18
19 BY MR. PARRY:

20 Q Now, the money that was counted up, do you recall the
21 total amount that you had at the end of that evening?

22 A We run about six or seven hundred dollars that first
23 night.

24 Q Now, were there any expenses paid?

25 A All the expenses are paid each night as you go.

1 Q Okay, and what were those expenses?

2 A Well, Charley, Pauly, Paul Comfort and myself and Paul
3 Brana got \$35 apiece and the stick man got thirty and
4 Joe Comfort got ten, plus we paid for the groceries
5 \$10 and the rent \$10.

6 Q Now, in regard to the people that were paid, did you see
7 them get paid?

8 A Yes.

9 Q You were present when Mr. Russo paid these people?

10 A Well, I think I paid them the first night myself so
11 I know they all got paid the first night.

12 Q And how much did you receive?

13 A \$35.

14 Q How much did Special Agent Brana receive?

15 A \$35.

16 Q Did you set any money aside for rent?

17 A Yes, we did, \$10.

18 Q And how much was set aside for ice?

19 A \$10. No, that's for groceries, coffee and sandwiches
20 and stuff like that.

21 Q Okay. Well now, maybe I confused you with the question.

22 THE COURT: It was a cold plate.

23

24 BY MR. PARRY:

25 Q Yes, sir, not the ice for drinks, Mr. Zito.

1 Q For the record, the witness has identified the defendant,
2 Gingello. Now, at the time that you met with Mr.
3 Gingello, can you tell us, please, what transpired?

4 A He came in and said he wanted to talk to me.

5 MR. NEMOYER: Your Honor, as far as my client,
6 Mr. Russotti, I would object to any
7 holding of what Mr. Gingello said outside
8 the presence of my client against my
9 client.

10 THE COURT: That is noted for the record.

11 MR. NEMOYER: Thank you, Judge.

12 THE COURT: Go ahead, Mr. Parry.

13
14 BY MR. PARRY:

15 Q You may proceed.

16 A He said he wanted to talk to me so we went out in front
17 where the door man is, Billy Barton, and he asked me
18 who this fellow was that I brought into the crap game.
19 I told him he was a friend of mine from New York.

20 Q Who was the fellow that he was referring to?

21 A Paul Brana, the agent.

22 Q All right. What else was said?

23 A And he told me that Snuffy Crock was in the night before
24 and seen this agent and recognized him as an agent
25 from Buffalo, New York.

1

1 Q Someone had recognized Mr. Brana as an FBI Agent from
2 Buffalo?

3 A That's correct.

4 Q All right. Please continue; what else was said?

5 A So he asked me who he was and what he was doing there
6 and I told him he was a friend of mine from New York
7 put up the bank roll to get the crap game started and
8 he wanted to know who gave him permission to come here
9 and I told him, I says it was Charley's game, it was
10 up to Charley to look into that.

11 Q And what else did Mr. Gingello say to you on this
12 occasion?

13 A Well, he told me, he says that I should have got
14 permission from him and Red to be in the scheme.

15 Q The Red that you referred, -that he referred to, who
16 was that?

17 MR. NeMOYER: Your Honor, I object on two grounds.
18 One, it calls for a conclusion. I think
19 the witness should be limited to what
20 someone said and then again that I request
21 that the jury be instructed that this,
22 at this stage, cannot be held against
23 my client.

24 THE COURT: All right. Whatever the conversa-
25 tion is between Gingello and Zito, Mr.

1 Russotti is not present, but certainly
2 you can consider against Mr. Gingello if
3 there is anything adverse to him but as
4 far as Mr. Russotti is concerned, at the
5 present you are not to consider this
6 testimony but you will hear the full
7 extent of the testimony, whatever it is.
8 Go ahead, please.

9 MR. NEMOYER: Your Honor, my objection is against
10 asking him who the "Red" refers to.
11 That is a conclusion.

12 THE COURT: That is a conclusion and I will
13 sustain the objection.

14 MR. NEMOYER: Thank you, Judge.

15
16 BY MR. PARRY:

17 Q Mr. Zito, what, if anything, did Mr. Gingello say
18 concerning outsiders coming to Rochester?

19 A He told me, he says "We don't want no strangers in
20 town". He says "This is our town, we don't want no
21 strangers here", and he told me that Red would be in
22 to see me tomorrow night.

23 Q Now, after the conversation with Mr. Gingello, what,
24 if anything, did you do?

25 A We continued with the crap game.

1 That is the crap game that had been going on before Mr.
2 Gingello spoke with you?

3 A That's correct.

4 Q And then you continued on with it afterwards?

5 A Right.

6 Q Did you have occasion on that evening to, - or strike
7 that. Now, in regard to the operation of the crap game
8 that night do you recall who the dealers were?

9 A Charley Russo and Paul Comfort and Joe Salerno was
10 working that night and Wally was on the stick; Paul
11 Brana was there; I was there and Billy Barton was on
12 the door and Joe Comfort was in the kitchen.

13 Q And in regard to the game itself, did this game follow
14 the same procedure you have previously described in
15 your testimony?

16 A Yes, it did.

17 Q This was a crap game?

18 A Right.

19 Q Now, in regard to the amount of money bet this evening,
20 were you, - or strike that. Did you work that evening
21 in the game?

22 A Yes, I did.

23 Q And what function did you perform?

24 A I was on the ladder.

25 Q And could you repeat for us what it is that you did

location, who was present?

A When I walked in there there was Molly, was there, Molly Marino was there, Joe Ross was there and there was a couple of guys I was surprised to see them there because they didn't patronize the crap game.

Q Now, in regard to the operators of the game, or the workers in the game, do you recall who was present?

A The same ones was present the night before.

Q And in regard now to Mr. Russo, did you have occasion to speak with Mr. Russo?

A As soon as I walked in he signaled me into the office and him and I went into the office and he told me that - -

MR. NEMOYER: Your Honor, unless my client is there, I would object to any of this being held against my client, if there is any reference to him.

THE COURT: I will, for the present, sustain the objection, but we will listen to the testimony and keep in mind that if Mr. Russotti is not there, that you should not consider this testimony as to him at all.

BY MR. PARRY:

Q How long did this conversation with Mr. Russo last?

said, whether they are three, four or five or six letter words. It does not make any difference.

THE WITNESS: He wanted to know what the fuck I was doing there.

BY MR. PARRY:

Q And what did you say?

A I told him I was trying to make some bread and he told me "Who the fuck told you to come here".

Q And what did you say?

A I told him I was trying to make some money for my lawyer and he started hollering somemore and he says "You got no fucking business being here, take your friend and get out of this fucking joint and don't ever come back here again", and he started slapping me.

Q Okay. Who is the friend that he is referring to?

A Paul Brana.

Q And you say that he slapped you?

A Yes, he did.

Q Do you recall approximately how many times?

A About three times.

Q Now, while you were having this conversation with Mr. Russotti, did Mr. Gingello say anything?

A Yes. He was talking at the same time that Red was

Q talking to me and was trying to ask me at the same time what Guv had to do with this operation and I told him "nothing". I said "He has nothing to do with this, he has something else to do with", and he started hollering at me and he told me if he had his way that I wouldn't leave that joint and we should kill him.

Q Kill who?

A Me.

Q Now, did you receive any instructions from Mr. Russotti?

A Just before he was getting ready to leave, Charley Russo asked him, made some remark to Red about "Tell him what to do with the money", and Russotti said that whatever I came in that game with to take it and leave with it and any winnings was to be left behind, the way I came in, that's the way I was to go.

Q Mr. Zito, I show you what has been marked as Government Exhibit Number 27 and ask you if you can identify the document, please.

A That's the transcript of the, - that was recorded on the tape the night I was at the office.

Q Now, at the time that you were in the office with Mr. Russotti, Mr. Gingello and Mr. Russo, you had the transmitter on your person?

A Yes, I did.

Q Was it to your knowledge, turned on?

That's correct.

Now, did you have discussions with Mr. Russo concerning these payments to Mr. Gingello?

THE COURT:

We can have a time and a place, Mr. Parry? Do you remember when this was or where it was?

THE WITNESS:

This was prior to me getting involved in the game when he told me what expenses that we had to go through if I put up money to operate this game.

BY MR. PARRY:

This is prior to the time that you invested money?

Yes.

In the Jay Street operation?

Back in January, 1973.

And can you recall any specific date?

Not specific, it was the later part of January, 1973.

Can you recall where the conversations or this conversation took place?

On Jay Street.

And was there more than one conversation?

There was a number of them.

Now, in regard to the payments to Mr. Gingello, did Mr. Russo explain to you what these payments would be for?

MR. BOREANAZ:

That is objected to, your Honor.

THE COURT:

All right. I will overrule the objection.

BY MR. PARRY:

Q You may answer.

MR. NEMOYER:

Your Honor, I object on the grounds that without a date I don't know when it comes in and it might well antedate---

THE COURT:

All right, fix a date. We do have an approximate date. Mr. Zito, try to think and fix the time and the place as carefully as you can.

THE WITNESS:

It was the last week in January before we started the crap game up and it was at Jay Street and I had numerous conversations with him at the time about what it was going to take to operate this game and how it was going to be operated and what expenses it entailed.

THE COURT:

When you say "him", you mean Mr.

Russo?

THE WITNESS:

Yes.

MR. PARRY:

Now, in regard to the expenses, what, if anything, did Mr. Russo tell you about these payments to Mr. Gingello?

MR. McMOYER:

Your Honor, for the record I would like to note an objection to this.

Overruled.

THE COURT:

THE WITNESS:

He told me that we had to pay a hundred dollars a day to operate the game and that money must go to Sammy Gingello.

MR. PARRY:

Did he explain why it had to go to Sammy Gingello?

Because he was the boss of gambling in Rochester. We needed his okay to run.

Did Mr. Russo - -

MR. McMOYER:

Your Honor, I object. This is conclusionary statements and not conversation, on both of those counts.

THE COURT:

You only give us what is said. Do not give us your conclusion. Is that what Mr. Russo said?

THE WITNESS:

That's what he told me.

THE COURT:

Do not give us, Mr. Zito, - be very careful. Make sure you do not give us

any of your opinion or any conclusion. All you tell us is exactly to the best of your recollection what was said.

THE PROSECUTOR:

Your Honor, I object on the further ground that this is some conclusion if it was said of Mr. Russo. I don't think Mr. Zito could testify to his conclusion and I object to him testifying as to someone else's conclusion.

THE COURT:

That is a point and at the present time, ladies and gentlemen, we are just listening to conversations. As far as whether it is an accurate conclusion or not we must listen to all the evidence in the case, all the circumstances about it keeping in mind through all of this the Government as the burden of proving guilt beyond a reasonable doubt and that burden never shifts at all to the defendants in any way. Mr. Parry.

BY MR. PARRY:

When you discussed these payments with Mr. Russo, did he use any particular term for these payments?

Well, he used the word, just we had to pay for permission

to operate, sometimes using the word, "ice, juice, vigor", you know.

Q One of the terms was "ice"?

A Yes.

Q Now, directing your attention to April 2, 1973, did you on that date have occasion to meet with Mr. Russo?

A Yes, I did.

Q And did that meeting take place at the Rochester Airport?

A It did.

Q Can you tell us, please, - strike that. Prior to the time that you met with Mr. Russo at the Rochester Airport that day, did you have occasion to speak with him on the telephone?

A Yes, I did.

Q Can you tell us, please, what was said in the course of that telephone conversation?

A He told me that they were going to go with the crap game on Jay Street and I would meet them that night at 8:00 o'clock and that Sammy Gingello was going to put up the same amount that we were to operate the game.

Q Was there any discussion of ice on that occasion?

A I don't recall.

MR. NEMOYER: Your Honor, I object on the ground of leading.

THE COURT: All right. We have the answer. I

1 A He met me at the airport. He was at the airport. I
2 was in the coffee shop. He came in there and I was
3 kind of surprised to see him and he told me that he
4 had some bad news and I said "What about" and he said - -
5 Q Mr. Zito, excuse me just a moment. I'm going to ask
6 you to slow down a little bit and stay back from the
7 microphone and let me ask you one question. You say
8 that you were surprised to see him. Had you arranged
9 to meet with him at the airport?

10 A No, I didn't. We arranged to meet at Webster Street
11 about 8:00 o'clock that night.

12 Q Now, you did, however, meet with him at the airport at
13 about 5:30, is that correct?

14 A Yes, I did.

15 Q Now, would you take it slowly, please, and tell us what
16 he said to you and what you said to him?

17 A When he came in and sat down with me he told me that
18 he had some bad news and I asked him what it was. And
19 he said that Sammy G. told him that they were going to
20 give the Jay Street gambling place to the Union for a
21 Union Hall, that he was going to get a place over on
22 Webster Avenue instead and he was going to get together
23 with them the next day to get the key.

24 Q All right. Who was going to get together with who?

25 A Charley Russo was going to get together with Gingello

the next day.

Was anything else said during the course of this conversation?

Well, he had his doubts whether he would get the keys or not, they were giving, - he thought they were giving him a fast shuffle trying to get him out of business.

And was there any discussion in this conversation concerning ice?

That he was going to lower the ice from \$600 to \$200 a week.

Who was going to lower the ice?

Sammy Gingello.

Now, was there any statement concerning the activities of Mr. Russotti with regard to the game?

MR. NEMOYER: Your Honor, I object on the grounds of leading. He asked him what the man said and now he is trying to lead him into it.

THE COURT: No, he is not. We will permit that. Overruled. Can you recall anything said about Mr. Russotti at that time?

THE WITNESS: Yes. Charley said that Red was going to play in the game so we can get off the ground and Sammy Gingello was going to put up \$5,000 and be a partner

with us and promote the game.

BY MR. PARRY:

Q Directing your attention now to April 9, 1973, did you have occasion on that date to meet with Special Agent Brana?

A Yes, I did.

Q And in regard to this meeting with Special Agent Brana, where did that take place?

A At the Batavia Motel.

Q And where did you, - where, if anyplace, did you go with Special Agent Brana after you met with him at the motel?

A We went to Webster Avenue.

Q When you arrived at Webster Avenue, who was present on that occasion?

A Charley Russo, Paul Comfort, Solly and Walt and Joe Salerno and Frank Ferrara was on the door and Joe Comfort was in the kitchen.

Q Now, did there come a time when you were present on that day when you met with or had a conversation with Mr. Russo?

A Yes, I did.

Q And can you tell us, please, what, if anything, Mr. Russo told you in that conversation?

1 Well, that was the night that there was a couple of
2 guys sitting at the table there and I asked him what
3 they were there for and he said Sammy G. wanted to put
4 these guys on the payroll.

5 Q All right. Now, that, - first of all, do you recall
6 where that conversation took place?

7 A In the office.

8 Q And what, if anything, brought these individuals to
9 your attention?

10 A Well, I recognized one of the guys as being one of
11 Sammy's friends and I was curious to know what he was
12 doing there.

13 Q Well, what, if anything, were these people doing?

14 A They were sitting at the card table playing cards
15 instead of patronizing the crap game.

16 Q And did that lead to your question to Mr. Russo about
17 who these people were?

18 A Yes.

19 Q Now, prior to that time, did you have a conversation
20 with Mr. Russo upon your arrival at the Webster Street
21 location?

22 A Not that I can recall right at this moment.

23 Q Is there anything that would refresh your recollection
24 in that regard?

25 A The FBI interview.

THE COURT:

What day is this again, Mr. Parry?

BY MR. PARRY:

Q This is April 9, 1973, Judge. Showing you what has been previously marked as Government Exhibit Number 11, would you examine that document, please. Have you had an opportunity to examine the document?

A Yes, I have.

Q Will you tell us, please, what the document is?

A It is an interview I had with FBI agents on the 10th of April, 1973.

Q And having examined Government Exhibit Number 11, has that refreshed your recollection concerning the contents of this conversation you had with Mr. Russo?

A Yes, it has.

Q When you arrived at the club. Will you tell us, please, what Mr. Russo said to you in the course of this conversation?

A He told me that one of these two guys was a friend of Sammy G. and he wanted us to put him on the payroll and also he told us that he was going to waive the ice for a couple of days until we got off the ground.

Q Now, that was the conversation that you testified to previously, is that correct?

A That's correct.

Q Now, at this point did a conversation occur between you and Charley Russo?

A Yes, there did. When we counted the money he told me that he was supposed to meet with Sammy Gingello to get the five thousand for his partnership and Sammy Gingello didn't show up.

Q Now, in regard to the people who worked the game that night you have already named those individuals. Can you tell us, please, at the end of the evening when the expenses of the game were to be met, were those individuals paid?

A Yes, they were.

Q And can you tell us, please, whether or not you were present when they were paid?

A I don't recall being present but we took the money out in the office, the amount of money each guy was supposed to be getting and Charley paid them.

Q That is, you gave the money to Charley Russo?

A We took the money from the bank roll and he took care of the expenses.

Q Approximately how long did the game operate that evening?

A About three hours.

Q In the course of the game's operation, what function did you fulfill?

A I was on the ladder.

And what function did Charley Russo fulfill?

Dealer.

What was Paul Comfort's function?

Dealer.

What was Joe Salerno's function?

He alternated relieving the dealers or the stick men or the ladder. He was the relief man.

And what was Walt's function?

Stick man.

And what was Solly Sharfstein's function?

Box man.

Now, in regard to these terms that you are using,

"dealer, box man, stick man", that is the same function or those are the same functions that you have previously described in your testimony?

Yes, they are.

And what did Joe Comfort do that evening?

He makes coffee and sandwiches and cleans up the place.

And what was Frank Ferrara's function that evening?

Door man.

And all of these individuals, - well, strike that. Now, could you tell us, please, approximately how long you worked the ladder that night?

Probably half the time that the game was in operation.

Approximately an hour and a half?

A Correct.

Q Now, in the course of your observations from the ladder, did you observe bets being placed?

A Yes, I did.

Q Can you tell us, please, the approximate range of those bets on this evening?

A Well, it was the first night we started the game and it was small. I would say five to twenty dollars, thirty dollars per person.

Q And on each roll of the dice, would it be fair to state that you have more than one person betting?

A Oh, yes.

Q Could you offer or could you tell us the approximate amount or the approximate range of the bets on each roll of the dice?

A About three or four hundred dollars a roll.

Q And in regard now to all of the bets that were placed that night by all of the bettors for every roll of the dice, could you tell us, please, the approximate total amount?

A Thirty, forty thousand dollars.

Q Directing your attention now, Mr. Zito, to April 10, 1973, did you have occasion on that date to meet with Special Agent Brana?

A Yes, I did.

what the approximate total amount of the bets placed that night was?

A Probably forty, fifty thousand dollars.

Q And at the end of the evening, were the workers paid as they had been on the other occasions?

A Yes, they were.

Q Were you present when that happened this night?

A I don't recall. Usually Charley took the pays and brought them out to the men out in the game room.

Q Now, did you have occasion on that night to see the defendant, Gingello?

A Yes, I did.

Q And what, if anything, did Mr. Gingello do when you saw him?

A He had a private conversation with Charley Russo.

Q After Mr. Gingello had this conversation with Mr. Russo, did you have occasion to speak to Mr. Russo?

A Yes, I did.

Q And what, if anything, did Mr. Russo say to you and what did you say to him?

A He told me that Sammy Gingello told him that Snuffy was in and - -

MR. BOREANAZ: Use me, your Honor. We have

heard this once before.

MR. PARRY: We haven't heard this one.

A He told me that Sammy Gingello told him Snuffy spotted this guy as a cop the night before.

Q What guy are we talking about?

A Paul Brana.

Q Would you please lean back from the microphone just a little bit. What else was said?

A And he wanted to know who he was and Charley also told me that he asked Sammy G. for the five thousand and Sammy Gingello said he was going to try to get it up in the next couple of days.

MR. PARRY:

May I have just a moment, your Honor. I have no further questions.

THE COURT:

We will be in recess, ladies and gentlemen, until ten after 11:00 at which time we will continue the testimony in this case. You recall my prior instruction to you. Spectators stay in your places while the jury goes out.

(Jury escorted from the courtroom.)

THE COURT:

Mr. Parry, there is some information Mr. Cioffi was going to give us. Will that take any time at all?

MR. PARRY:

Well, sir, we are bringing one man

conversation with Mr. Gingello in person?

A. Right.

Did he tell you the same thing then?

A. Yes.

That Brana was a federal agent?

A. Yes.

You are sure about that?

A. Am I sure of what?

That that is what he told you on Wednesday?

A. Yes.

You don't want to change that at all, do you?

A. That he was a cop?

That that is what you were told on Wednesday the 11th of April by Mr. Gingello?

A. He told me he thought that Snuffy recognized him as an agent from Buffalo.

On Wednesday?

A. Right.

The 11th of April?

A. I believe so.

1973?

A. Yes.

Where did this conversation take place?

A. In the Webster Street Club.

All right. Now, was there any other conversation on

that day with Mr. Gimgello that you claim occurred?

A. Yes.

Q. On the 11th?

A. Yes. He wanted to know who gave Brana permission to be there?

Q. All right.

A. He wasn't concerned about me. He was concerned about Brana and that's why I think he didn't really believe he was a cop.

Q. All right. How long did the conversation last?

A. Ten minutes, eleven minutes.

Q. And was that the extent of the conversation, what you have told us here in court?

A. No, there was more to it. He said we should have permission to have the guy.

Q. I see. Did you talk with him on any other occasion that day?

A. No.

MR. BOREANAZ: Would you mark this, please?

(Defendants' Exhibit Number 3 marked
for identification.)

BY MR. BOREANAZ:

Q. Do you remember, sir, in April of 1973 appearing before

Q. I see. Well, is the answer yours or not, sir?

A. I would say it is, yes.

Q. All right. Now, the very next question you were asked was "Who told you that", and did you say "Sammy G."?

A. Right.

Q. Were you then asked, "This is a meeting you had with him on Wednesday night, right?"

A. Right.

Q. Did you say "Right, the night before Thursday"?

A. Right.

Q. And did you then say "And he told you he felt this fellow was a New York racketeer trying to take over Rochester"?

A. Right.

Q. And did you say "Yes"?

A. Right.

Q. And were you then asked, "Why was it that Sammy felt that the New York mob might be trying to take over Rochester", and did you say "Because he knew I was social with New York people and Rochester was up for grabs and he thought it was a way of moving in to find out what was going on in Rochester"?

A. Right.

Q. Now, that was about the same conversation that you say you had with Mr. Cingello on Wednesday, wasn't it?

1 A. Right.

2 Q. Did you make any reference in there to Gingello telling
3 you that he thought Brana was a cop?

4 MR. PARRY: Objection. He wasn't even asked
5 that in the grand jury. He can't be
6 responsible for what he wasn't asked.

7 THE COURT: Wait a minute. The objection is
8 overruled and it is up to the jury to
9 recall what the former testimony was and
10 how it now compares with the grand jury
11 testimony. The defense counsel is
12 entitled to cross examination about prior
13 statements or testimony given by the
14 witness.

15
16 BY MR. BOREANAZ:

17 Q. All right. I will repeat the question to you, sir. Did
18 you make any reference in there to your claim that
19 Gingello told you that he thought Brana was a cop?

20 A. No.

21 Q. Well, which did he tell you, that the thought he was a
22 cop or a racketeer from New York City trying to move in
23 on the Rochester mob?

24 A. Both.

25 Q. He told you both. In other words, you claim now that

1 A. I don't know if they are referring to the prior game or
2 the game we are in. I never seen it when I wasn't in-
3 volved in the game.

4 Q. Well, the question related to Jay Street, did it not?

5 A. Jay Street has been a gambling joint for two or three
6 years.

7 Q. The question related to the period of time, "Q: On the
8 occasion when you were operating at Jay Street, do you
9 claim you personally paid any money to Gingello", wasn't
10 that the question?

11 A. Can I see it?

12 Q. Was that the question?

13 A. Can I read it to myself?

14 Q. All right. Will you answer my question first and then
15 I will let you see it?

16 A. Fine, okay.

17 Q. Did you understand the question?

18 A. Repeat it again.

19 Q. On the occasion that you were operating at Jay Street,
20 do you claim you personally paid any money to Mr.
21 Gingello?

22 A. No.

23 Q. All right. You gave that answer previously?

24 A. Right.

25 Q. Do you claim you ever saw him actually being paid any

1 A. I can't answer it.

2 Q. Is it because maybe you are trying to do a job here in
3 this case?

4 A. No reason for it.

5 MR. PARRY: Objection.

6 THE COURT: Overruled.

7

8 BY MR. BOREANAZ:

9 Q. No reason for it?

10 A. No, sir.

11 Q. When did you first start giving information to the
12 federal agents?

13 A. Sometime in February.

14 Q. Of what year?

15 A. '73.

16 Q. All right. Now, at that time what was your status?

17 A. I don't understand what you mean "status".

18 Q. Well, did you have any charges pending against you?

19 A. I know I was sentenced already.

20 Q. All right. Did you have any bail posted?

21 A. Yes.

22 Q. And you were out on bail pending an appeal, weren't you?

23 A. Yes.

24 Q. The appeal had been filed in January of 1973, had it
25 not?

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- 1 A. Well, federal time.
- 2 Q. Well, you knew you stood a good chance of serving a
3 good part of it, didn't you?
- 4 A. A third of it, yes, at least a third.
- 5 Q. At least a third or more?
- 6 A. Or more.
- 7 Q. A third would be the minimum amount, wouldn't it?
- 8 A. Yes.
- 9 Q. Now, you also had been fined by the federal government,
10 had you not?
- 11 A. Yes.
- 12 Q. How much was the fine?
- 13 A. Fifty-five hundred.
- 14 Q. \$5,500?
- 15 A. That's right.
- 16 Q. Did you ever pay any of that fine?
- 17 A. No. It was remanded. It was taken back.
- 18 Q. It was taken back, taken away?
- 19 A. Yes.
- 20 Q. The \$7,000 that you had in January 1973, not one red
21 cent of that went to the federal government in payment
22 of your obligation to them, did it?
- 23 A. It wasn't necessary. My appeal wasn't up.
- 24 Q. I see, and then you claimed afterwards that you had
25 lost all the money that you had?

1 that there is none that you are aware
2 of after diligent investigation.

3 MR. PARRY:

That is correct, Judge.

4 THE COURT:

Mr. NeMoyer, I think you are first.

5 MR. NeMOYER:

6 Well, your Honor, I wonder if I
7 could, - well, I move for a direct
8 verdict of acquittal, your Honor, based
9 on I don't think they have made a prima
10 facie case, Judge, to go to the jury in
11 several respects. One, Judge - -

12 THE COURT:

13 Let me ask you this so I can tell
14 the jury what to do; should I tell the
15 jury to come back at 2:00?

16 MR. NeMOYER:

17 I have a brief witness, if you deny
18 the motion.

19 THE COURT:

20 Are you going to speak? I mean,
21 you are entitled to talk and I certainly
22 am delighted to listen, but I just want
23 to tell the jury.

24 MR. NeMOYER:

25 I would prefer maybe even delaying
my motion and put the witness on.

THE COURT:

I think your motion first and then
the witness.

MR. NeMOYER:

All right. I will be very brief,
Judge.

1 THE COURT:

All right.

2 MR. NEMOYER:

3 insufficient. They haven't substantiated
4 thirty or more days, your Honor. The
5 indictment alleges thirty or more days
6 but I don't believe the evidence warrants
7 that conclusion. The indictment doesn't
8 mention two thousand or more, Judge.
9 I think the evidence even depends on
10 your definition of "gross", but I say
11 that a more common definition would show
12 that they don't substantiate two thousand
13 in one day, Judge. The most I think of
14 wins of something like sixteen hundred.
15 I think the losses, Judge, there is an
16 indication, in fact, that wasn't play,
17 that was due to something else and as
18 far as my client, Mr. Russotti goes,
19 your Honor, Zito said that the only time
20 he talked to him was this one occasion
21 which was recorded, that he himself had
22 never talked to him about this operation
23 on any other occasion nor was he present
24 when anyone else talked to him about
25 this operation on any occasion, that the

1 only testimony putting my client in any
2 sort of gambling operation, your Honor,
3 I say to the contrary, shows he wasn't
4 part of it. He came in. He said,
5 "What are you doing here, who told you
6 to come here", and "what are you doing
7 here". Your Honor, I submit that there
8 just isn't sufficient evidence with re-
9 gard to the defendant Russotti to submit
10 the case to the jury.

11 THE COURT:

Mr. Parry, anything you want to say?

12 MR. PARRY:

13 Well, your Honor, I think the
14 evidence in this case does support that
15 the business was in substantially
16 continuous operation for thirty or more
17 days. It is true the operation was only
18 conducted at Webster Street for five days
19 but we attempted to show and I think we
20 have, for purposes of prima facie case,
21 shown that this was a continuation of the
22 same operation that was at Jay Street.
23 As for the allegations in the indictment,
24 we, you know, we have covered this, I
25 believe, in pretrial matters, but the
form of the indictment we would maintain

1 is sufficient as drawn to allege violation
2 of the Federal Gambling Statutes and as
3 far as the evidence of the \$2,000 in any
4 given day, we would maintain consistent
5 with the case law that the \$2,000
6 computation should be based on wagers
7 placed with the business and not on the
8 basis of any kind of net profits, wins
9 or losses in that regard, so I believe
10 that we have met these elements.

11 THE COURT:

Mr. Parry, is it the Government's
burden to prove not only \$2,000 a day,
but also that there was operation for
more than thirty days?

15 MR. PARRY:

No, sir. We can prove in the
alternative.

17 THE COURT:

In other words, the statute reads
in the alternative?

19 MR. PARRY:

Yes, sir. We can prove one or the
other.

21 MR. NEMOYER:

Your Honor, they have not shown a
violation of, - they have not introduced
any evidence or shown a violation of the
law of the State of New York. Your Honor,
they have submitted no expert or evidence

1 to show a violation of the law of the
2 State of New York, your Honor. The
3 article, they allege, is Article 225 and
4 it, by and large, charges one as to know-
5 ingly advance or profit from unlawful
6 gambling activity. I think the evidence
7 here on both locations, your Honor, is
8 that they lost and the law in New York
9 is technical, your Honor. When the
10 Statute was amended in 1967, they made an
11 exception for a player and Mr. Parry has
12 asked you to take judicial notice of this
13 law of the State of New York, Section 225.
14 That is the only subsection he left out
15 is the part that refers to players, your
16 Honor, and I think while these men might
17 have been players or might not have been
18 players, but he had to bring someone in
19 to show one way or another that and that
20 it violated the law of the State of New
21 York, Judge, and he just hasn't done it.

22 THE COURT:

Mr. Parry.

23 MR. PARRY:

24 Well, the fact that they might have
25 lost or won under the law of the State
of New York, I believe is immaterial.

1 Article 225 has a Subsection 4 in that
2 under the law of the State of New York,
3 that article, a person who advances
4 gambling activity does so when acting
5 other than as a player, he engages in
6 conduct which materially aids any form
7 of gambling activity and such conduct
8 includes, but is not limited to conduct
9 directed toward the creation or establish-
10 ment of a particular gambling game,
11 contest or scheme and so on. There is
12 no mention made of a profit having to be
13 made. It is like the rest of life, you
14 take your chances.

15 MR. NeMOYER:

Your Honor, that section is a section
that defines terms. That section does
not make an offense. The section is
Section 225.05 and other sections, Judge.

16
17
18
19 THE COURT:

Mr. NeMoyer.

20 MR. NeMOYER:

Yes.

21 THE COURT:

I am glad to listen to you, but I
just want to find out. I don't want to
have the jury sitting there for half an
hour.

22
23
24
25 MR. NeMOYER:

I am done, Judge. This is my last

1 argument.

2 THE COURT:

I am glad to listen to you longer,
3 but I want to tell the jury.

4 MR. NEMOYER:

This is it. I contend that under
5 the law of the State of New York, he
6 hasn't made out an offense. He has to
7 bring in somebody to set that forth and
8 he hasn't done it, Judge.

9 MR. PARRY:

Your Honor - -

10 THE COURT:

Excuse me, I find it would certainly
11 be inappropriate to bring in an expert
12 witness to tell us what the law of the
13 State of New York is and whether or not
14 there is a violation of the statute under
15 the facts here and, therefore, on all
16 grounds, Mr. NeMoyer, I deny your motion.
17 Mr. Boreanaz.

18 MR. BOREANAZ:

Yes, your Honor. On behalf of the
19 Defendant Gingello, I move to dismiss
20 Counts 1 and 2 of the indictment, on the
21 ground there is insufficient proof as a
22 matter of law to submit this case to
23 the jury. I adopt the arguments of Mr.
24 NeMoyer and I would point out to the
25 Court that I perceive the difference

1 between the first and second counts of
2 this indictment. In order to sustain
3 them, the Government's burden, insofar
4 as it relates to the conspiracy count
5 of this indictment, they would have to
6 show that the defendant Gingello combined,
7 conspired or agreed with others to conduct,
8 finance, manage, supervise and direct
9 or own an illegal gambling business.
10 That is drawn right from the very language
11 of their own indictment. I submit there
12 is no proof sufficient to create an
13 issue of fact with respect to that aspect
14 of the case. As the Court well knows,
15 one could very well act in a manner which
16 may aid or assist the conduct of an
17 illegal enterprise without combining,
18 conspiring or confederating to so do.
19 I submit that the Government's proof in
20 this respect is equivocal. I submit the
21 proof insofar as it relates to the
22 defendant Gingello as to whether there
23 was an agreement or conspiracy on his
24 part is to the contrary, to the effect
25 he did not conspire or that he did not

1 agree and so I respectfully move to dis-
2 miss both counts, but I call specific
3 attention to the conspiracy count.

4 THE COURT:

5 Mr. Parry, as far as defendants
6 Russotti and Gingello are concerned,
7 what evidence do you have in the case
8 to show that they conspired?

9 MR. PARRY:

10 The evidence would center primarily
11 around the conversations that Zito had
12 with Mr. Russo who we allege is a co-
13 conspirator, in which Mr. Russo explained
14 the purpose of the visitation from
15 Russotti and Gingello coming to the
16 gambling location. That is, they were to
17 come on April 12th. The purpose was to
18 protect their gambling interest in
19 Rochester because they feared Brana as
20 an outsider.

21 THE COURT:

22 We get back to this again and again.
23 Do we not have to prove conspiracy by
24 independent evidence?

25 MR. PARRY:

That is correct, and the independent
evidence - -

THE COURT:

Other than hearsay.

MR. PARRY:

Right, but once you show participa-

1 MR. WALSH:

2 Yes, your Honor. I will be very
3 brief, although I think you have already
4 covered my point and my point, specifi-
5 cally is that 1955, that the Government
6 must meet certain requirements and the
7 title of that particular section is
8 "Prohibition of Illegal Gambling
9 Businesses", at which time it goes on to
10 talk about what the burden is, and the
11 burden being that they have to show a
12 violation of the law of the state.
13 Now, your Honor, relative to that, he
14 cites in a generic way, Section 225 of
15 the Penal Law and he does, as Mr. NeMoyer
16 pointed out, he talks about certain
17 sections which come under definitions.
18 When you follow up the other various
19 sections of the law, the 2.05, - 225.05
20 talks about advances or profits from an
21 unlawful gambling operation. Decimal
22 ten relates to bookmaking. Fifteen,
23 twenty, twenty-five refer to records.
24 Thirty refers to a gambling device,
25 possession of. Thirty-five is, -
26 presumes knowledge if a person does

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possess, and forty is relative to a lottery.

Now, I feel that unless they can come in and show those elements that are required by 1955, - for instance, I don't know what section of the New York State Penal Law these men would be charged with, were we over in the City Court of Buffalo and not in your Honor's courtroom. He talks about number, - he talks about these offenses, definitions and he does set it out in one of the papers that he submits and "unlawful" means not specifically authorized by law, so I suppose that the footnotes go on to tell you what is authorized by law such as bingo, off-track betting, parimutuel, et cetera, etc. I think from the reading of that statute and the allegations contained in his indictment, that that is a fundamental part of the proof to prove the violation of 1955.

THE COURT:

What do you have to say about State law, Mr. Parry?

MR. PARRY:

Well, in regard to that, the

indictment sets forth Article 225 of the Penal Law of the State of New York and Section 225.05 which Mr. Walsh has referred to states that a person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity. If you go to the definitional section of Article 225, it says a person advances gambling activity when acting other than as a player he engages in conduct which materially aids any form of gambling activity. The additional definitional section is contest of chance is any contest, game, games, scheme or gaming device in which the outcome depends in a material degree upon an element of chance notwithstanding the skill of the contestant, may also be a factor therein. What we have done here is we have put in evidence concerning a dice game which I maintain under these definitions is a game of chance and we have shown that these defendants advanced that kind of activity and again, getting back to Mr.

NeMoyer's argument whether they came out winners or losers is immaterial because the Section 225.05 is in the alternative. In other words, it says when he knowingly advances or profits an unlawful gambling activity. Therefore, we would maintain we have satisfied that element under Section 1955.

THE COURT:

Mr. Walsh, do I understand your position is that if the defendants here were charged in New York State Court, that under New York State cases, that the indictments presented here would be insufficient because the details are not set forth in particular fashion?

MR. WALSH:

I think an information of this nature would be thrown out in the first instance in the City Court of Buffalo, your Honor, because it would be defective on its face.

THE COURT:

Let us not talk about information. What about an indictment? I suppose this would be prosecuted by information, would it not?

MR. NeMOYER:

It just doesn't charge the section,

PROCEEDINGS:

February 14, 1977, 5:30 p.m.

APPEARANCES:

As before noted.

(Defendants Russotti and Gingello present. Defendant Russo not present.)

(Jury not present.)

THE COURT:

Mr. Boreanaz is here, Mr. Walsh, everyone. I thought it would be best if we maybe briefly discussed the problem tonight so that as soon as the jury came in the morning we could begin promptly rather than take our time in the morning and delay the beginning of summations. Mr. Parry, maybe the first thing we should take up, the Stirone case, that was an anti-trust case, wasn't it, Mr. Walsh? Is that the case?

MR. WALSH:

It was an Hobbs Act case, your Honor.

THE COURT:

Hobbs Act?

MR. WALSH:

Yes.

THE COURT:

What about Mr. NeMoyer's motion, Mr. Parry? The indictment here is a very simple straight forward one. I looked at the other 1955 case I had and there, if you were concerned with time, 30 days.

1 and here I would think that you imply
2 that the game lasted more than 30 days
3 but now you want to argue that the or
4 situation should apply, that the gross
5 amount on a single day was more than
6 \$2,000. Is this sufficient to charge a
7 violation?

8 MR. PARRY:

Yes, sir. I would argue that this
9 does set forth a violation of Section 1955.

10 THE COURT:

Do you have any support for this,
11 do you have any cases where this has been
12 taken up?

13 MR. PARRY:

No, sir. As best as I can determine,
14 this is a matter of first impression. I
15 received these motions this afternoon and
16 I spent about an hour and a half trying
17 to find some case law in this regard and
18 I really have not been able to find any.

19 THE COURT:

Because it seems to me in trying to
20 prepare a defense it makes a big difference
21 to the defendant whether the theory of
22 the case is going to be whether the game
23 was in operation more than 30 days or
24 whether the take was more than \$2,000 in
25 any single day.

MR. PARRY:

Well, I think in terms of apprizing the defendant of exactly that which he has to defend against in this matter that it could be argued again, as I say, I find this a matter of first impression, - it could be argued that we did track the language of the statute in Count 2 and the reference to the game being in violation of Article 225 and that involved five or more persons are actually jurisdictional elements going to the definition of an illegal gambling business and that the statute itself says that you shall not conduct, finance, manage, supervise, direct or own an illegal gambling business and having tracked that language of the statute in making reference to Section 1955, that would be sufficient. The rest and remainder of that Count in the indictment could, in effect be treated as surplusage in that it goes to describing the jurisdictional elements of illegal gambling business which would be required to bring about Federal jurisdiction.

1 THE COURT:

I think that there may be some
2 difficulty here but I will reserve
3 decision on the motion.

4 MR. NEMOYER:

Your Honor, could I be heard
5 briefly on it?

6 THE COURT:

Yes, Mr. NeMoyer.

7 MR. NEMOYER:

Just that he did not track the
8 language of the statute at all with
9 regard to the two thousand, your Honor.
10 They admitted in their papers it is an
11 essential element, I submit the two
12 thousand is not surplusage. That's all.

13 MR. BOREAHAZ:

Judge, I would like to just add this
14 for what little it is worth. I know
15 the hour is late, but this is the second
16 try by the Government at framing an
17 indictment here. You may recall that
18 the first indictment had to go out
19 because it was improperly framed in
20 naming numbers of defendants and so this
21 is a superseding indictment because the
22 first one didn't muster up to snuff. Now,
23 if they can't get it right in two tries,
24 I think we are entitled to the three
25 strikes and out rule.

MR. PARRY:

Well, in that regard, Judge, as long as we are going to treat this as a motion against the indictment, I would say under Rule 12(b) since we have had three years prior to trial on this thing under Rule 12(b) this is an untimely motion and can't be brought at this stage.

MR. NAMOYER:

Your Honor - -

THE COURT:

Signals off. We have heard enough. It can be brought now. If they didn't even bring it up now the Court of Appeals, if, in their wisdom thought the indictment was insufficient, they could take it up and dismiss.

MR. PARRY:

If it failed to state a defense.

THE COURT:

Certainly. What about the defendants, what they call request for judicial notice of law?

MR. PARRY:

That poses no problem, Judge. Although in regard to the, - this section about the crap game taking place in a public, - a crap game in a public place, I don't quite understand the relevancy or the purpose.

THE COURT:

Here in the charge, what do you want

1 MR. PARRY:

A charge like that would be fine.

2 THE COURT:

Something like that?

3 MR. PARRY:

Yes, a charge like that would be fine.

4
5 THE COURT:

On the other hand, if you put it around, - all right. I will look at this and write up a substitute charge which I will tell you about before we go. All right. Mr. NeMoyer, is there anything else?

10
11 MR. NeMOYER:

Yes. I would like maybe an opportunity in the morning to be heard on my first point, Judge.

12
13
14 THE COURT:

This is on the - -

15 MR. NeMOYER:

On the fact that a necessary element was the two thousand or more if they wanted to use that as proof.

16
17
18 THE COURT:

I will hear you briefly but it is a very narrow point. In these cases there have not been, - there have been some, there may be and perhaps in other cases, and you should be able to get this from your Organized Crime Section very quickly wherein other cases that you would use the same form of the indictment

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and the matter was briefed and argued.
It would seem to me to be quite helpful.

1
2
3 MR. PARRY:

Well, yes, sir. I did spend some
time on the phone and have been unable
to come up with anything.

4
5
6 MR. NeMOYER:

That's why I called him early this
morning, Judge, when I first got it
together to advise him of this issue.

7
8
9 THE COURT:

There may be some parallels. I
thought the Stirone case, - but that is
a Hobbs Act case. I will take a look at
that. The Supreme Court has been tough
on the way indictments, - of course, we
had a good example of it in a smuggling
case where the Government charged attempted
smuggling but there is no violation of
law for attempt to smuggle.

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18 MR. NeMOYER:

There seems to be a barrage of
cases, your Honor, fifteen or more, which
say they have to charge the elements.

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20
21 THE COURT:

Mr. Boreanaz.

22
23
24
25 MR. BOREANAZ:

Yes, your Honor. The point is this,
the Government charges the elements of
one way of committing the crime in its
indictment. Now they seek the benefit
of urging the jury to convict in yet

another way because when you analyze this two thousand or more and/or 30 continuous days, those are two different alternate ways of proving the thing.

THE COURT:

That would be like, - there are a number of sections but you might look at some of these sections, for example, under some of the check sections or some of the, - where they have a number of these kind of or, so you have to charge the correct one.

MR. BOREANAZ:

Well, what we are saying, Judge, is that if their proof is sufficient on the question of 30 or more continuous days then that is the only theory that they are entitled to go to the jury on if, in fact, it is sufficient and they can't come in now and either get the benefit of charge on two thousand or more in a day or argue that to the jury because the accusatory instrument, the indictment here takes that right out of the case. Now, to allow them to interject that as an alternate means of committing the same crime into the case at the

conclusion is just not proper.

THE COURT:

I think you should look at some other sections, Mr. Parry and Mr. NeMoyer. For example, if you look at 641, the first paragraph, it says, "Whoever embezzles, steals, purloins or converts money of the United States". Then the second one, "Whoever receives, conceals". In those kind of sections you find that you have to charge the right sub-paragraph.

MR. NeMOYER:

Maybe Mr. Parry, overnight, could get something from the Department, Judge.

THE COURT:

All right. Very well. We will convene then at 9:30.

MR. PARRY:

Your Honor, if I could make one inquiry, Mr. Boreanaz made a motion the other day concerning the conspiracy charge as it involved the sufficiency of the Government's evidence to get this case to the jury in regard to Mr. Gingello and I believe it also included Mr. Russotti.

THE COURT:

Yes.

MR. PARRY:

Based on the single transaction and I have submitted some case authority

1 your summation, Mr. Parry. Then probably
2 what we will do is take a luncheon break
3 and then have them come back. Are there
4 any Exhibits you need before we begin?

5 MR. PARRY:

I have the one Exhibit in evidence
and I have the rest of the Government
Exhibits here.

6
7
8 THE COURT:

Was there a stipulation? Did you
get that stipulation back, Mr. NeMoyer?

9
10 MR. NeMOYER:

Yes, Judge. I gave it to your
clerk last night.

11
12 THE COURT:

I know. Did you get it back?

13 MR. NeMOYER:

No, Judge, I did not.

14 THE COURT:

Do you know where that is?

15 MR. NeMOYER:

I don't need it, Judge.

16 THE COURT:

Maybe somebody else would.

17 MR. NeMOYER:

Okay. It had an orange cover on it.

18 THE COURT:

I have so many orange covers I feel
almost sunshiny. All right. We will
find it here. Miss Wright, would you
ask the jury to come up, please.

19
20
21
22 MR. BOREANAZ:

Your Honor, I assume you have
denied our motions to dismiss?

23
24 THE COURT:

Yes.

25 MR. BOREANAZ:

And that insofar as you have

indicated as to what you are going to charge that pursuant to the written requests we have in, that that is far as you will go.

Yes.

THE COURT:

MR. BOREANAZ:

All right. Then the record should reflect that we except to the denial and to the refusal to charge pursuant to the written request.

MR. NEMOYER:

I join.

MR. WALSH:

I join in that on behalf of the defendant, Russo.

THE COURT:

Nevertheless, as you know, after the charge, you ought to, in particular, tell me where I have gone wrong and at that time in particular, tell me what further charge you seek at the end of the charge. I will listen to the summations and there may be some minor changes but I do not think, as far as, especially what we just talked about.

(Jury returns to the courtroom.)

THE COURT:

Ladies and gentlemen, we have finished

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the Appellee's Brief and two (2) copies of its Appendix have been mailed to counsel for Appellant at the following address:

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